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In the Supreme Court of the United States

E. I. DU PONT DE NEMOURS AND COMPANY, *ET AL.*, PETITIONERS

v.

UNITED STATES OF AMERICA, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, as two circuits have held following this Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), but the court below rejected, a party that is potentially responsible (a "PRP") for cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, and that undertakes such a cleanup and incurs those costs without the compulsion of a Section 106 or 107 civil action and therefore cannot sue for contribution under Section 113(f)(1) as construed in *Cooper*, has a cause of action under Section 107(a) or federal common law against another PRP to recover an equitable share of the cost of the cleanup.

PARTIES TO THE PROCEEDING

Petitioners, E. I. du Pont de Nemours and Company, ConocoPhillips Company, and Sporting Goods Properties, Inc., were the plaintiffs and the appellants in the courts below. Respondents, the United States of America, United States Department of Commerce, United States Department of Defense, United States Department of the Army, United States Department of Energy, United States Department of the Interior, and United States Department of the Navy, were the defendants and appellees.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioner E. I. du Pont de Nemours and Company is a publicly held corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner ConocoPhillips Company, the successor in interest to Conoco Inc., is wholly owned by ConocoPhillips Holding Company, which in turn is wholly owned by ConocoPhillips, a publicly held company.

Petitioner Sporting Goods Properties, Inc., is wholly owned by petitioner E. I. du Pont de Nemours and Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
TABLE OF APPENDICES	x
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
A. The CERCLA Regulatory Scheme	2
B. The History Of This Case	8
REASONS FOR GRANTING THE PETITION	11
I. THERE IS A SQUARE AND EXPLICIT CIRCUIT CONFLICT ON THE IMPORTANT AND RECURRING CERCLA ISSUE PRESENTED IN THIS CASE	11

Contents

Page

II. THE THIRD CIRCUIT ERRED IN REJECTING A PRP'S CAUSE OF ACTION TO RECOVER AN EQUITABLE SHARE OF CLEANUP COSTS FROM OTHER RESPONSIBLE PARTIES 13

A. Section 107(a)(4)(B) Provides An Express Cause Of Action 15

1. The plain statutory language establishes the Section 107(a) cause of action 15

2. The background, history, and purpose of CERCLA demonstrate the existence of the Section 107(a) cause of action 18

3. The Third Circuit's rejection of a Section 107(a) cause of action puts the United States in a preferred position over other PRPs and therefore is inconsistent with congressional intent 24

B. Alternatively, An Implied Cause Of Action Exists Under Section 107(a) ... 25

C. In The Alternative, A Cause Of Action Arises Under Federal Common Law ... 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

Atl. Research Corp. v. United States, 459 F.3d 827 (8th Cir. 2006) ..... *passim*

Boyle v. United Techs. Corp., 487 U.S. 500 (1988) 27, 28

Conn. Nat'l Bank v. Germaine, 503 U.S. 249 (1992) 15

Consol. Edison Co. of N.Y. v. UGI Util. Inc., 423 F.3d 90 (2d Cir. 2005) ..... *passim*

Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004) ..... *passim*

Engine Mfrs. Ass'n v. S. Coast Air Mgmt. Dist., 541 U.S. 246 (2004) 15

Fisher Dev. Co. v. Boise Cascade Corp., 37 F.3d 104 (3d Cir. 1994) 22

FMC Corp. v. U.S. Dep't of Commerce, 29 F.3d 833 (3d Cir. 1994) (en banc) 24, 25

Harrison v. PPG Indus., Inc., 446 U.S. 578 (1980) 22

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 27

Key Tronic Corp. v. United States, 511 U.S. 809 (1994) ..... *passim*

Authorities

Page

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 22

Musick, Peeler & Garrett v. Employees Ins. of Wausau, 508 U.S. 286 (1993) 25

New Castle County v. Halliburton NUS Corp., 111 F.3d 1116 (3d Cir. 1997) 5

Northwest Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77 (1981) 4, 14, 26, 27, 29

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 3, 20, 21, 24

PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610 (7th Cir. 1998) 5

Reading Co., In re, 115 F.3d 1111 (3d Cir. 1997) .. 5

Schaefer v. Town of Victor, 457 F.3d 188 (2d Cir. 2006) 2, 7, 20

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 3, 22

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 4, 27, 28

United States v. Bestfoods, 524 U.S. 51 (1998) 3, 20

Page

United States v. USX Corp., 68 F.3d 811 (3d Cir. 1995) 28

Whitfield v. United States, 543 U.S. 209 (2005) ... 22

Federal Statutes, Rules, and Miscellaneous:

40 C.F.R. Part 300 (2004) 3

28 U.S.C. § 1254(1) 1

42 U.S.C. § 9601 *et seq.* ..... *passim*

42 U.S.C. § 9601(21) 3, 15

42 U.S.C. § 9604 3

42 U.S.C. § 9606 ..... *passim*

42 U.S.C. § 9607(a)(4) ..... *passim*

42 U.S.C. § 9607(a)(4)(A) 3

42 U.S.C. § 9607(a)(4)(B) ..... *passim*

42 U.S.C. § 9613(b) 28

42 U.S.C. § 9613(f)(1) ..... *passim*

42 U.S.C. § 9613(f)(3) 5

42 U.S.C. § 9620(a)(1) 3, 24

Authorities

Page

Amendment to National Oil and Hazardous Substance Contingency Plan, 48 Fed. Reg. 40,658 (Sept. 8, 1983) 23

National Oil and Hazardous Substance Pollution Contingency Plan, 55 Fed. Reg. 8666 (Mar. 8, 1990) 23

Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613 ..... *passim*

H.R. REP. No. 96-1016(I) (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119 21

H.R. REP. No. 99-253(I) (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835 ..... 19, 29

H.R. REP. No. 99-253(III) (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038 29

S. REP. No. 99-11 (1985) 29

126 CONG. REC. 26,388 (1980) (remarks of Rep. Florio) 21

126 CONG. REC. 31,965 (1980) (statement of Rep. Florio) 28

126 CONG. REC. H11,787 (1980) (statement of Rep. Florio) 27, 28

131 CONG. REC. 24,725 (1985) (statement of Sen. Domenici) 21

Authorities

Page

Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987) 24

Oversight Hearings Before the House Subcomm. On Admin. Law and Governmental Relations, Comm. On Judiciary, 99th Cong. Sess. 51 (1985) 19

Lee M. Thomas & F. Henry Habicht II, U.S. EPA, Interim CERCLA Settlement Policy (OSWER Directive No. 9835.0) (1984) 23

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit (Filed August 29, 2006) 1a

Appendix B — Memorandum Opinion Of The United States District Court For The District Of New Jersey Filed December 30, 2003 And Amended Order (Dated January 8, 2004) 76a

Appendix C — Opinion And Order Of The United States District Court For The District Of New Jersey (Filed March 1, 2004) 115a

Appendix D — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing (Dated October 30, 2006) 124a

Appendix E — Statutory Provisions Involved 126a

Petitioners, E. I. du Pont de Nemours and Company, *et al.* ("DuPont"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-75a) is reported at 460 F.3d 515. One opinion and order of the district court (App., *infra*, 76a-114a) are reported at 297 F. Supp. 2d 740. The other opinion and order of the district court (App., *infra*, 115a-123a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2006. By order entered on November 1, 2006, the court of appeals denied DuPont's timely petition for rehearing (App., *infra*, 124a-125a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, are reproduced in the appendix to this petition (App., *infra*, 126a-133a).

STATEMENT

In *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) ("*Cooper*"), this Court held that a party that is potentially responsible (a "PRP") for the cleanup of a contaminated site under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, does not have a cause of action for contribution against another PRP under Section 113(f)(1) of the Act if it has not been sued under Sections 106 or 107. In so ruling, the Court expressly left open the question whether a PRP that had voluntarily undertaken a cleanup and incurred cleanup costs without the compulsion of a Section 106 or Section 107 civil action could bring suit against another PRP to recover an

equitable share of the cost of the cleanup pursuant to Section 107(a) of CERCLA. *See* 543 U.S. at 168-71. In a separate opinion, two Justices addressed the question left open by the majority and concluded that such a cause of action does lie under Section 107(a). *See* 543 U.S. at 172-74 (Ginsburg, J., joined by Stevens, J., dissenting).

Following *Cooper*, three circuits have now decided this question. Unanimous panels of the Second and Eighth Circuits have held that a PRP does have such a cause of action. *See Consol. Edison Co. of N.Y. v. UGI Util. Inc.*, 423 F.3d 90 (2d Cir. 2005), *pet. for cert. filed*, No. 05-1323 (Apr. 14, 2006), *order calling for the views of the Solicitor General* (Oct. 2, 2006); *Schaefer v. Town of Victor*, 457 F.3d 188 (2d Cir. 2006); *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *pet. for cert. filed*, No. 06-562 (Oct. 24, 2006). By contrast, in direct and express conflict with those decisions, a divided panel of the Third Circuit in this case held that there is no such cause of action. App., *infra*, 60a.[1]

In light of this square circuit conflict on the important and recurring CERCLA issue left open in *Cooper*, this Court's review is warranted. Furthermore, because the conflict is created by the decision below, and because this case provides the most suitable vehicle for resolving the issue, it would be appropriate for the Court to grant this petition for certiorari. If the Court believes it would be beneficial also to have before it a decision reaching the contrary conclusion, the granted cases could be consolidated for briefing and oral argument.

A. The CERCLA Regulatory Scheme.

1. CERCLA was enacted in 1980 in response to serious environmental and health risks posed by property contaminated

1. The Section 107(a) issue also is pending in the Seventh and Ninth Circuits. *See Metro. Water Reclamation District of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc.*, No. 05-3299 (7th Cir. argued Jan. 20, 2006); *City of Rialto v. DOD*, No. 05-56749 (9th Cir. oral argument not yet scheduled).

with hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). Congress empowered the President (acting through the Environmental Protection Agency ("EPA")) either directly to clean up a contaminated property pursuant to Section 104 or to compel PRPs to conduct the clean up pursuant to Section 106. 42 U.S.C. §§ 9604, 9606. In either case, EPA may recover its response costs pursuant to Section 107(a)(4). 42 U.S.C. § 9607(a)(4).

"The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the cost of cleanup." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (plurality opinion of Brennan, J.), *overruled on other grounds*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Congress identified four broad classes of PRPs in Section 107(a)(1)–(4). 42 U.S.C. § 9607(a). In particular, Congress both expressly provided that the United States is itself a "person" potentially liable under CERCLA and explicitly waived the sovereign immunity of the United States so that it could be sued for the costs of cleaning up contamination for which it is responsible. 42 U.S.C. §§ 9601(21), 9620(a)(1).

Section 107(a)(4) provides that PRPs "shall be liable for . . . (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." Of particular relevance here, it also provides that PRPs are liable for "(B) any other necessary costs of response incurred *by any other person* consistent with the national contingency plan." 42 U.S.C. §§ 9607(a)(4)(A), (B) (emphasis added). The "national contingency plan" is an EPA regulation specifying procedures for responding to hazardous substance contamination. *See* 40 C.F.R. Part 300 (2004).

2. As this Court explained in *Cooper*, after the enactment of CERCLA in 1980, various lower courts held that (1) PRPs that had incurred response costs voluntarily, without having first

been sued in a Section 106 or 107 civil action, were expressly authorized by Section 107(a)(4)(B) to recover their costs from other PRPs, and (2) PRPs that had been sued in a Section 106 or 107 civil action had a right to contribution from other PRPs, either impliedly from the provisions of the statute or as a matter of federal common law, even though CERCLA as originally enacted "did not mention the word 'contribution'. . . ." 543 U.S. at 162. *See also Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994) ("numerous cases" interpreted CERCLA — "particularly . . . § 9607 . . ." — to authorize a cause of action for "a private party that had incurred cleanup costs to seek contribution from other PRPs"). Thus, after the enactment of CERCLA, PRPs were permitted to recover a proportionate share of their response costs from other PRPs in two different and distinct procedural circumstances: when they had incurred those costs in the absence of a Section 106 or 107 civil action, under the express provision of Section 107(a)(4)(B); or when they had been sued in a Section 106 or 107 civil action, by implication of such a right under the Act or as a matter of common law.

To allay any concern that the latter line of cases implying a right to contribution under the statute might be "debatable" (*Cooper*, 543 U.S. at 162) in light of *Northwest Airlines, Inc. v. Transportation Workers Union of America*, 451 U.S. 77, 90-99 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638-647 (1981) (refusing to recognize implied or common-law rights to contribution under statutes other than CERCLA), Congress included an express contribution right in the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. No. 99-44, 100 Stat. 1613. It amended CERCLA to include Section 113(f), which provides, *inter alia*, that "[a] person may seek contribution from any other person who is liable or potentially liable under [Section 107], during or following any civil action under [Section 106] or under [Section 107]." 42 U.S.C. § 9613(f)(1). Section 113(f)(1) also contains a savings clause: "Nothing in this subsection shall

diminish the right of any person to bring an action for contribution in the absence of a civil action under [Section 106] or under [Section 107]." *Id.*

Thus, as this Court explained in *Cooper*, "[i]n short, after SARA, CERCLA provided for a right to cost recovery in certain circumstances, § 107(a), and separate rights to contribution in other circumstances, §§ 113(f)(1), 113(f)(3)(B)." 543 U.S. at 163. In *Key Tronic*, this Court described those remedies as "similar and somewhat overlapping." 511 U.S. at 816. In *Cooper*, the Court observed that "[t]he cost recovery remedy of § 107(a)(4)(B) and the contribution remedy of § 113(f)(1) are similar at a general level in that they both allow private parties to recoup costs from other private parties . . . [b]ut the two remedies are clearly distinct." 543 U.S. at 163 n3.

3. In the 18 years between the passage of SARA and this Court's decision in *Cooper*, the lower courts broadly construed Section 113(f)(1) to permit a PRP to recoup cleanup costs from other PRPs in both of the circumstances covered by pre-SARA law, regardless of whether there had been a prior Section 106 or 107 civil action. *See, e.g., In re Reading Co.*, 115 F.3d 1111 (3d Cir. 1997); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998). Based on this understanding, the courts treated Section 113(f)(1) as the exclusive means by which one PRP could recover contribution from other PRPs, whether or not there had been a Section 106 or 107 civil action. *See, e.g., Reading*; *New Castle*; *PMC*. Because at the time Section 113(f)(1) provided a cause of action to a PRP to recover an equitable share of its response costs from other PRPs even in the absence of a Section 106 or 107 civil action, courts held that a separate cause of action did not arise under Section 107(a) on the ground that a Section 107(a) right would be duplicative of Section 113(f)(1) and would allow circumvention of the express and inclusive right in Section 113(f)(1).

In *Cooper*, this Court, relying upon the "natural meaning" of the enabling clause in the first sentence of Section 113(f)(1), upset this long-held understanding and limited the applicability of Section 113(f)(1) to contribution claims asserted "during or following" a Section 106 or 107 civil action. At the same time, the Court noted that the specific purpose of the savings clause in last sentence of Section 113(f)(1) "is to clarify that § 113(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may exist independently of § 113(f)(1). In other words, the sentence rebuts any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP." 543 U.S. at 166-67. Two Justices, writing separately in *Cooper*, would have held that Section 107(a)(4)(B) provides such a right where a Section 113(f)(1) cause of action would be unavailable under *Cooper*. *See* 543 U.S. at 172-74 (Ginsburg, J., joined by Stevens, J., dissenting).

4. Following the Court's decision in *Cooper*, a unanimous panel of the Second Circuit held in *Consolidated Edison* that a PRP that voluntarily incurs response costs, in the absence of a prior Section 106 or 107 civil action, may seek cost recovery from other PRPs under Section 107(a)(4)(B). Based on *Cooper*'s explanation that the Section 107(a) and the Section 113(f)(1) rights, although "similar at a general level in that they both allow private parties to recoup costs from other private parties," are "clearly distinct," and in light of the holding of *Cooper* "that a section 113(f)(1) action is only available during or following a specified civil action," the court of appeals concluded "that it no longer makes sense to view section 113(f)(1) as the [exclusive] means by which the section 107(a) cost recovery remedy is effectuated by [PRPs]. Each of those sections, 107(a) and 113(f)(1), embodies a mechanism for cost recovery available to persons in different procedural circumstances." *Consol. Edison*, 423 F.3d at 99. The court reasoned that "[g]iven that section 107(a) is distinct and independent from section 113(f)(1), and that section 113(f)(1)'s remedies are not available to a person

in the absence of a civil action as specified in that section, determining whether a party in [the plaintiff's] circumstances may sue under section 107(a) is easily resolved based on that section's plain language. Section 107(a) makes parties liable for the government's remedial and removal costs and for 'any other necessary costs of response incurred by any other person consistent with the national contingency plan.'" *Id.* Furthermore, "[u]nlike some other courts, we find no basis for reading into this language a distinction between so-called 'innocent' parties and [PRPs]. Section 107(a) makes its cost recovery remedy available, in quite simple language, to *any* person that has incurred necessary costs of response, and nowhere does the plain language of section 107(a) require that the party seeking necessary costs of response be innocent of wrongdoing." *Id.* at 99-100 (citation omitted). Subsequent to *Consolidated Edison*, another unanimous panel of the Second Circuit reached the same conclusion. *See Schaefer*, 457 F.3d 188.

Following the Second Circuit's decision in *Consolidated Edison*, a unanimous panel of the Eighth Circuit also reached the same conclusion. In *Atlantic Research Corporation v. United States*, the court held "that a private party which voluntarily undertakes a cleanup for which it may be held liable, thus barring it from contribution under CERCLA's § 113, may pursue an action for direct recovery or contribution under § 107, against another liable party." 459 F.3d 827, 837 (8th Cir. 2006). In that case, Atlantic Research and the United States were both PRPs, and the company undertook a cleanup without the compulsion of a Section 106 or 107 civil action. The Eighth Circuit, after holding that *Cooper* was sufficient intervening authority for it to reconsider the prior law of the circuit that Section 113(f)(1) provided the exclusive cause of action, reviewed the pre-*Cooper* judicial interpretations of the relationship between Sections 107(a) and 113(f)(1) in which the courts "direct[ed] traffic" between the two by narrowly construing Section 107(a) to be unavailable where Section 113(f)(1) authorized a PRP to sue other PRPs for contribution. *Id.* at 832. Relying on the

conclusion of *Cooper* that the two remedies are "distinct," the court determined that "it is no longer appropriate to view § 107's remedies exclusively through a § 113 prism." *Id.* at 835. As the court explained: "We reject an approach which categorically deprives a liable party of a § 107 remedy. Like the Second Circuit, we return to the text of CERCLA, and find no such limitation in Congress's words." *Id.* In line with the Second Circuit, the Eighth Circuit held that each section "embodies a mechanism for cost recovery available to persons in different procedural circumstances." *Id.* The court concluded that the "plain text" of the savings clause in Section 113(f)(1) reflects an express congressional intent to preserve other rights to contribution and "discern[ed] nothing in CERCLA's words suggesting Congress intended to establish a comprehensive contribution and cost recovery scheme encouraging private cleanup of contaminated sites, while simultaneously excepting — indeed, penalizing — those who voluntarily assume such duties." *Id.* at 836. The court pointed out that a ruling barring recovery under Section 107(a)(4) would not only be contrary to CERCLA's purpose of making those responsible for contamination pay for their share of the cleanup but, in the case of the United States as a PRP, it would produce "an absurd and unjust outcome" because "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle. This bizarre outcome would eviscerate CERCLA whenever the government, itself, was partially responsible for a site's contamination." *Id.*

B. The History Of This Case.

1. DuPont filed this case against the United States in December 1997. It asserted claims to recover an equitable share of response costs it had incurred and would incur in the future in cleaning up 15 industrial facilities that were involved in wartime production. Both DuPont and the United States are responsible for some of the contamination and thus are PRPs

under CERCLA. DuPont had not been subject to a civil action under Section 106 or 107.[2]

In July 1999, the district court ordered that DuPont's claim with respect to its plant at Louisville, Kentucky be prepared as a test case, and discovery was stayed as to the remaining 14 facilities. The United States admitted, and the district court held, that the government was liable with respect to the Louisville plant under CERCLA. Through July 2000, DuPont had spent approximately $24 million investigating and cleaning up hazardous substance contamination at the Louisville plant. The United States, even though liable along with DuPont for that contamination, has contributed nothing to those costs.

2. Insofar as relevant here, the district court granted summary judgment to the United States on DuPont's Section 113(f)(1) claim with respect to the Louisville plant on the ground that Section 113(f)(1) of CERCLA did not authorize DuPont's claim for contribution in the absence of a Section 106 or 107 civil action. Following further proceedings, the district court dismissed with prejudice DuPont's complaint as to all sites.

On DuPont's appeal, a divided panel of the Third Circuit affirmed the orders of the district court in all relevant respects. The panel held that under Third Circuit precedent (which it

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2. The DuPont cleanups involved in this case were "voluntary" in the sense that they were not compelled by a Section 106 of 107 civil action. Rather, they were undertaken pursuant to federal and state environmental statutes and subject to regulatory oversight either by EPA or a counterpart state agency. For example, at the Louisville plant that was the focus of the proceedings in the district court, the cleanup occurred pursuant to a permit issued under the corrective action program of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6901 *et seq.* ("RCRA"). (During the course of the appeal, it was learned that, in 2001, the Necco Park site had been the subject of a Section 107 action. Accordingly, the court of appeals altered the district court's dismissal to be without prejudice. *See* App., *infra*, 62a n.33.)

concluded it could not reconsider after *Cooper*), Section 107(a) authorizes suit only by an "innocent party" against PRPs and therefore could not be invoked by a plaintiff PRP like DuPont. In adhering to this interpretation, the panel expressly disagreed with the post-*Cooper* decisions of the Second and Eighth Circuits. *See* App., *infra*, 27a-31a, 60a.

Furthermore, while those Third Circuit precedents had entitled a PRP to bring a Section 113(f)(1) suit against other PRPs even if it had not been subject to a Section 106 or 107 civil action, such a remedy now was foreclosed by *Cooper*. As a result of *Cooper* and the panel's adherence to its "innocent party" decisions under Section 107, a PRP like DuPont that had not been sued under Section 106 or 107 but voluntarily undertook a cleanup has *no* right to sue other PRPs to recover an equitable share of cleanup costs. Here, too, the panel's decision conflicts with the post-*Cooper* rulings of the Second and Eighth Circuits.

In seeking to justify that result, the panel distinguished between voluntary cleanups and those undertaken pursuant to a lawsuit or settlement between the PRP and EPA or a state. App., *infra*, 47a-57a. In the panel's view, Congress did not intend to encourage voluntary cleanups that might not be supervised by a governmental agency but rather meant to promote only supervised cleanups in accordance with litigation, a consent decree, or an administrative settlement. *Id.* at 46a-47a.

Judge Sloviter filed a vigorous dissent. App., *infra*, 64a-75a. In line with the decisions of the Second and Eighth Circuits, she concluded that, following *Cooper*, a PRP not subject to a Section 106 of 107 action could sue other PRPs under Section 107(a) for an equitable share of its cleanup costs. As Judge Sloviter explained, this interpretation was required by the plain language of Section 107(a), the text and history of the savings clause to preserve existing rights to contribution, and the fundamental congressional objectives of achieving prompt cleanups of contaminated sites and requiring each PRP to bear the cost of its pollution.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SQUARE AND EXPLICIT CIRCUIT CONFLICT ON THE IMPORTANT AND RECURRING CERCLA ISSUE PRESENTED IN THIS CASE.

As explained above (*see* pages 1-2, *supra*), there is a square and explicit conflict among the circuits on the CERCLA issue that this Court left open in *Cooper*. The Second and Eighth Circuits, in line with the views expressed by Justice Ginsburg and Justice Stevens in *Cooper*, have held that a PRP that voluntarily undertakes a cleanup without the compulsion of a Section 106 or Section 107 civil action, and therefore that cannot bring a contribution action under Section 113(f)(1) as construed in *Cooper*, is entitled to sue other PRPs to recover an equitable portion of the cleanup costs under Section 107. In contrast, the Third Circuit in this case rejected such a cause of action. Both the panel majority and Judge Sloviter in dissent expressly recognized that the panel's ruling conflicted with the decisions of the Second and Eighth Circuits. *See* App., *infra*, 27a-31a, 60a; *id.* at 69a (Sloviter, J., dissenting). Furthermore, the Solicitor General, in the government's petition for certiorari in *Atlantic Research*, acknowledges this "clear" and "direct" conflict. *Atl. Research* Pet. 8, 9.

In addition, the CERCLA question in this case presents an important and recurring issue that calls for this Court's review. Indeed, review is warranted here for precisely the same reasons that certiorari was granted in *Cooper*. Moreover, with specific respect to the issue that *Cooper* left open and that is presented here, the Court in *Cooper* noted "the importance of the § 107 issue" (543 U.S. at 170) and explained that "the relationship between §§ 107 and 113 . . . is a significant issue in its own right." *Id.* at 169; *see also id.* at 172-74 (Ginsburg, J., dissenting) (noting need for resolution of the issue).

Furthermore, this circuit conflict is now ripe for resolution. Following *Cooper*, three circuits have addressed the issue and

rendered lengthy opinions. Absent the Court's intervention, this conflict will persist and cause needless uncertainty in the regulated and environmental communities and unnecessary litigation in the courts. *See also Cooper*, 543 U.S. at 174 (Ginsburg, J., dissenting) (expressing a desire to avoid protracting litigation).

The need for this Court's immediate guidance is reinforced by the unsettled state of CERCLA law after *Cooper*. Prior to *Cooper*, every circuit to consider the issue allowed a PRP in the circumstances of this case to sue other PRPs for contribution. Most of those decisions grounded the cause of action in Section 113(f)(1) and, concomitantly, reasoned that Section 107(a) could not be utilized to duplicate the remedy, or evade the restrictions, in Section 113(f)(1). Now that *Cooper* has rejected the Section 113(f)(1) claim, the prevailing law in each of those circuits, unless and until revisited by the court of appeals, is that Section 107(a) does not provide a cause of action. This ongoing uncertainty and circuit-by-circuit litigation are both detrimental to CERCLA implementation and burdensome to the judicial system and litigants alike.

Worse yet, under the decision below, the prevailing law of CERCLA has been turned upside down. While prior to *Cooper* PRPs like petitioners could have brought cases like this one against other PRPs, the Third Circuit has held (contrary to the Second and Eighth Circuits) that *Cooper* does not justify reconsideration of its Section 107(a) precedents. Under the Third Circuit's decision, the right of action that existed before *Cooper* now has simply evaporated. Although *Cooper* of course rejected the Section 113(f)(1) claim, that is all that it rejected. If the consequence of *Cooper* is that there is no such right of action at all – not only under Section 113(f)(1) but under Section 107(a) and federal common law as well – it is this Court that should say so. And if that is to be the law going forward, it is critical that companies, the executive branch, and Congress know it as soon as possible.

Finally, this case provides the appropriate vehicle for the Court's resolution of the issue. Because the Third Circuit's decision is the latest in the post-*Cooper* line of rulings and gives rise to the conflict, it represents the most suitable case for the Court to review and will serve to sharpen the Court's consideration of the question presented. Furthermore, because only this case presents the question whether a cause of action exists under federal common law as well as under Section 107(a), it provides the full range of issues for decision by this Court; disposition of the question presented in *Consolidated Edison* and in *Atlantic Research* would leave the federal-common-law issue unresolved.

Accordingly, this petition for a writ of certiorari should be granted and the judgment of the Third Circuit reversed.

II. THE THIRD CIRCUIT ERRED IN REJECTING A PRP'S CAUSE OF ACTION TO RECOVER AN EQUITABLE SHARE OF CLEANUP COSTS FROM OTHER RESPONSIBLE PARTIES.

The question in this case is whether, following *Cooper*, a PRP that voluntarily undertakes a cleanup and incurs costs without the compulsion of a Section 106 or Section 107 civil action has *no* cause of action to recover an equitable share of cleanup costs from other potentially responsible parties and therefore must itself bear the *entire* cost of the cleanup. The Third Circuit's rejection of that cause of action is supported neither by legal principles governing CERCLA and federal common law nor by considerations of fairness and common sense. The plain language of the liability provision in Section 107(a)(4)(B) and of the savings clause in Section 113(f)(1) demonstrates the existence of this right of action. Furthermore, this reading is confirmed by the background of the statute and the evolution of the case law under it. Likewise, such a cause of action is necessary to effectuate the fundamental objectives of CERCLA. Finally, beyond the statutory right itself, federal common law establishes a cause of action for contribution.

In *Key Tronic*, this Court recognized that "§ 107 unquestionably provides a cause of action for [PRPs] to seek recovery of cleanup costs" and "authorizes [PRPs] to recover cleanup costs from other PRPs." 511 U.S. at 818; *id.* at 821 (Scalia, J. dissenting) ("[under] §§ 107(a)(4)(A) and (B), a [PRP] who has incurred costs to clean up a hazardous waste site can recover those costs from any other party liable under CERCLA"). To be sure, the Court divided over whether this Section 107 cause of action was explicit or implicit in CERCLA; the majority opinion written by Justice Stevens concluded that it was implied, while Justice Scalia's dissent indicated that it was express. *See id.* at 818 at n.11; *id.* at 822 (Scalia, J., dissenting). Notwithstanding that division in the context of the issue of attorneys' fees in *Key Tronic*, petitioners submit, for the reasons discussed *infra*, that the better analysis is that Section 107(a) expressly rather than implicitly establishes the right of a PRP to recover an equitable share of cleanup costs from other PRPs. Indeed, the Second and Eighth Circuits have so held.[3]

In the end, however, whatever the correct analytical framework, the overarching and controlling point is that *all* the Justices agreed in *Key Tronic* that Section 107 does provide such a cause of action. As Justice Ginsburg recently explained, *Key Tronic* rested "squarely and solely on § 107(a)(4)(B)," and "no Justice [in *Key Tronic*] expressed the slightest doubt that § 107 indeed did enable a PRP to sue other covered persons [PRPs] for reimbursement, in whole or in part, of cleanup costs the PRP legitimately incurred." *Cooper*, 543 U.S. at 172 (Ginsburg, J., dissenting).

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3. Petitioners believe that the best reading of *Key Tronic* is that the majority referred to the cause of action as "implied" in the sense that its scope and meaning had to be filled in by implication rather than in the sense that the Court has used that term in cases such as *Northwest Airlines and Texas Industries*. *See* pages 25-27, *infra*.

A. Section 107(a)(4)(B) Provides An Express Cause Of Action.

1. The plain statutory language establishes the Section 107(a) cause of action.

Cooper holds that CERCLA must be construed in accordance with its "natural meaning." 543 U.S. at 166; *see also Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 257 (2004); *Conn. Nat'l Bank v. Germaine*, 503 U.S. 249, 253-54 (1992). The plain statutory text establishes that a PRP can recover an equitable share of cleanup costs from other PRPs pursuant to Section 107. Indeed, as *Key Tronic* explained, Section 107(a) creates "a similar and somewhat overlapping remedy" to the cause of action for contribution in Section 113(f)(1). 511 U.S. at 816. By its own admission, the Third Circuit's decision is at odds with *Key Tronic*: by holding that only innocent parties can proceed under Section 107 and that PRPs cannot sue under Section 107 even if the requirements for a Section 113(f)(1) suit under *Cooper* are not met, the court of appeals has left a gaping hole that renders Sections 107 and 113 "complementary . . . but not really 'overlapping,' as the Supreme Court had suggested in *Key Tronic* . . . ." App., *infra*, 14a.

Entitled "[l]iability," Section 107 states that any person in the four enumerated categories of PRPs "shall be liable for . . . any other necessary costs of response *incurred by any other person* consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B) (emphasis added). The language of Section 107(a)(4)(B) is expansive. It refers, without limitation, to "any other person." Under Section 101 (21), "person" is broadly defined: "[t]he term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601 (21). Accordingly, under Section 107(a)(4)(B), a PRP is liable to "any other person,"

including another PRP, for an equitable share of cleanup costs. *See Key Tronic*, 511 U.S. at 818 (Section 107 "authorizes private parties to recover cleanup costs from other PRPs"); *id.* at 821-22 & n.* (Scalia, J., dissenting) (under Section 107(a), "a party who has incurred costs to cleanup a hazardous waste site can recover those costs from any other party liable under CERCLA"); *Cooper*, 543 U.S. at 172 (Ginsburg, J., dissenting); *Consol. Edison*, 423 F.3d at 99-100; *Atl. Research*, 459 F.3d at 834-35; App., *infra*, 72a (Sloviter, J., dissenting).

The Third Circuit and other courts have construed Section 107(a)(4)(B) to be limited to "innocent parties"; under this reading, a Section 107(a) cause of action is available only to entities that have no responsibility for the contamination or cleanup, thus excluding PRPs. *See* App., *infra*, 26a. However, Section 107(a) contains no such restrictive language and the term "innocent party" appears nowhere in the statute. Rather, as explained above, PRPs fit comfortably within Section 107(a)(4)(B)'s broad sweep. *See Key Tronic*, 511 U.S. at 818 (emphasis added) (Section 107 "authorizes private parties to recover cleanup costs from *other PRPs*"); *see also id.* at 821 (Scalia, J., dissenting) (under Section 107(a), "*a party who has incurred costs* to cleanup a hazardous waste site can recover those costs from *any other party* liable under CERCLA") (emphasis added); *Consol. Edison*, 423 F.3d at 99-100; *Atl. Research*, 459 F.3d at 834-35.

In addition to the text of Section 107(a)(4)(B), the Third Circuit's interpretation of the savings clause in Section 113(f)(1) is irreconcilable with *Cooper*. The savings clause provides: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] of this title or section [107] of this title." 42 U.S.C. § 9613 (f)(1). The gravamen of the decision below is that Section 113(f) provides the sole and exclusive means for a PRP to recover an equitable share of cleanup costs from other PRPs. That reading is diametrically opposed to the text of the

savings clause. As this Court held with unmistakable clarity in *Cooper*, the savings clause in Section 113(f)(1) "*rebuts* any presumption that the express right of contribution . . . [in Section 113(f)(1)] is the *exclusive* cause of action for contribution available to a PRP." 543 U.S. at 166-67 (emphasis added); *see also Key Tronic*, 511 U.S. at 816 (Sections 113(f)(1) and 107(a) provide "similar and somewhat overlapping remed[ies]").

Furthermore, the Third Circuit's interpretation renders the savings clause a nullity. Under its decision, the savings clause does nothing more than "merely clarif[y]" that the cause of action provided in Section 113(f)(3) for contribution suits after settlements is not displaced by, or subject to the same preconditions found in, the separate contribution action in Section 113(f)(1). App., *infra*, 35a. With all due respect, it is impossible to believe that, even absent the savings clause, the separate, distinct, and contemporaneously enacted provisions in two subsections of Section 113(f) would have been misread and collapsed in the manner that concerned the Third Circuit. If Congress had meant the savings clause in Section 113(f)(1) to apply only to the cause of action in Section 113(f)(3) — two subsections of the same section that were enacted at the same time — it surely would have said so. The court's construction improperly trivializes the important office of the savings clause.

Finally, prior to *Cooper*, courts in rejecting a Section 107(a) suit by a PRP against other PRPs expressed concern that such a cause of action would duplicate the contribution action in Section 113(f)(1) and allow a PRP to elect to sue under Section 107(a) rather than under Section 113(f)(1), thereby circumventing the statutory preconditions on the Section 113(f)(1) right. *See Atl. Research*, 459 F.3d at 832-33. *Cooper*, however, eliminates any such concern. After *Cooper*, a PRP has no ability to choose to proceed under one or the other of those provisions; rather, Sections 107(a) and 113(f)(1) "embod[y different] mechanism[s] for cost recovery available to persons in different procedural circumstances." *Consol. Edison*, 423 F.3d at 99; *see also Atl. Research*, 459 F.3d at 833-34. Thus, for a

PRP that has been subject to a civil action under Sections 106 or 107, the appropriate contribution claim arises under Section 113(f)(1) as *Cooper* held; for a PRP in other circumstances, Section 107(a)(4)(B) provides the cause of action; but in neither event is there duplication or circumvention of the statutory scheme as construed in *Cooper*.

2. The background, history, and purpose of CERCLA demonstrate the existence of the Section 107(a) cause of action.

The Third Circuit's decision, in rejecting a Section 107(a) cause of action, frustrates the congressional understanding in CERCLA. The background, history, and purpose of CERCLA confirm what the plain statutory language shows: that Section 107(a) provides a cause of action for a PRP to recover an equitable share of cleanup costs from other PRPs.

a. The Third Circuit's ruling turns upside down the congressional intent in amending CERCLA in 1986 by enacting SARA. As explained above (*see* pages 4-5, *supra*), SARA included both the express contribution provision and the savings clause in Section 113(f)(1). Congress made explicit in the savings clause that, by adopting the express provision for contribution in specified circumstances in Section 113(f)(1), it did not intend to "diminish the right of any person to bring an action for contribution in the absence of a civil action under [Sections 106 or 107]." 42 U.S.C. § 9613(f)(1). Accordingly, in enacting Section 113(f)(1), Congress did not abrogate any right of contribution that existed before SARA in circumstances where Section 113(f)(1) would be inapplicable because, under *Cooper*, of the absence of a Section 106 or 107 civil action. In this way, it expressly preserved the two causes of action — and in particular the cause of action under Section 107(a)(4)(B) — that predated SARA.

As previously discussed (*see* pages 3-4, *supra*), and as the Third Circuit recognized, the case law prior to the 1986 SARA amendments "allowed private parties, including PRPs, to seek

contribution for costs incurred in forced or voluntary cleanups." App., *infra*, 9a; s*ee also Cooper*, 543 U.S. at 161-62 (pre-SARA cases held that "a private party that had incurred response costs, but that had done so voluntarily and was not itself subject to suit, had a cause of action for cost recovery against other PRPs"). Thus, pre-SARA law would have allowed petitioners to bring this action against the United States as a PRP.

The effect of the Third Circuit's decision, therefore, is to attribute to Congress in 1986 the intent to cut back on contribution rights by eliminating the existing cause of action between PRPs in cases of voluntary cleanups. As the court of appeals was forced to concede, however, there is nothing in the legislative history that so much as hints at such a retrogressive intent. App., *infra*, 47a. In fact, the savings clause is expressly to the contrary. Furthermore, the legislative history underscores that Congress in enacting Section 113(f)(1) did not contemplate the restriction or elimination of contribution rights under pre-SARA law. *See, e.g.*, H.R. REP. No. 99-253 (I) at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 (one of the principal goals was to "clarif[y] and confirm[ ] the right of a person held jointly and severely liable . . . under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the clean-up or cost that may be greater than its equitable share"); *Oversight Hearings Before the House Subcomm. on Admin. Law and Governmental Relations, Comm. on Judiciary*, 99th Cong. 51 (1985) ("[t]he fairness of a joint and several scheme depends upon the availability of contribution"). Thus, in enacting Section 113(f)(1), Congress did not intend "to eliminate the preexisting right to contribution." *Atl. Research*, 459 F.3d at 836.

b. The Third Circuit's decision also would defeat rather than advance the fundamental congressional purposes in CERCLA. As this Court and the lower courts consistently have recognized, the statute has two principal objectives: (1) to promote the prompt and voluntary cleanup of hazardous waste sites; and (2) to ensure that the parties responsible for the

pollution bear the cost of the cleanup. *United States v. Bestfoods*, 524 U.S. 51, 56 (1998) ("*[e]veryone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup") (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. at 21 (1989) (emphasis in original)); *Consol. Edison*, 423 F.3d at 94 (["t]wo of [CERCLA's] primary goals include 'encourag[ing] the timely cleanup of hazardous waste sites,' and 'plac[ing] the cost of that [cleanup] on those responsible"); *Atl. Research*, 459 F.3d at 837 ("CERCLA's goal of encouraging prompt and voluntary cleanup of contaminated sites").

The Third Circuit's decision impairs both policies. First, by precluding contribution, it will discourage PRPs from undertaking prompt cleanups on a voluntary basis. *See Consol. Edison*, 423 F.3d at 100 (elimination of Section 107(a) action would "impermissibly discourag[e] voluntary cleanup" and "would create a perverse incentive for PRPs to wait until they are sued before incurring response costs"); *Atl. Research*, 459 F.3d at 837. Indeed, the district court below (whose judgment the Third Circuit affirmed) explicitly recognized that the rejection of a Section 107(a) action "might very well hamper some PRP efforts at removal and remediation of hazard[ous] waste sites." App., *infra*, 103a.

Second, the Third Circuit's decision violates the "polluter pays" principle. This case well illustrates that problem. Here, although the United States has contributed to the contamination at the sites at issue, petitioners bear 100% of the cost of the cleanup and the government avoids liability altogether.

Both the Second and Eighth Circuits recognized these inherent defects in the approach adopted by the Third Circuit. They therefore upheld a Section 107(a) action to promote rather than defeat the purposes of Congress. *See Consol. Edison*, 423 F.3d at 100; *Schaefer*, 457 F.3d at 201; *Atl. Research*, 459 F.3d at 837.

To justify its result, the Third Circuit sought to draw a bright line between voluntary cleanups and those pursuant to a settlement between the PRP and EPA. *See* App., *infra*, 46a-57a. The court emphasized the advantages of cleanups that were supervised by the EPA and pointed to two CERCLA provisions designed to encourage PRPs to enter into settlements. *See id.* at 35a. It is a far cry, however from concluding that, by *encouraging* settlements for cleanups, Congress meant to discourage or eliminate voluntary cleanups. *See id.* at 73a (Sloviter, J., dissenting).

There is nothing in the statute or legislative history that excludes voluntary cleanups from contribution actions between PRPs. On the contrary, while, as the Third Circuit pointed out, Congress recognized the desirability of settlements, it also referred to voluntary cleanups. *See* App., *infra*, 72a-73a (Sloviter, J., dissenting); H. R. REP. No. 96-1016(I), 96 Cong., 2nd Sess. at 16-17 (1980), *reprinted* in 1980 U.S.C.C.A.N. 6119, 6120 (1980) (emphasis added) (CERCLA "would also establish a federal cause of action . . . to induce such persons *voluntarily* to pursue appropriate environmental response actions"); 131 CONG. REC. 24,725, 24,730 (1985) (statement of Sen. Domenici) (emphasis added) ("The goal of CERCLA is to achieve effective and expedited cleanup of as many uncontrolled hazardous waste facilities as possible. One important component of the realistic strategy must be the encouragement of *voluntary* cleanup actions or funding without having the President rely on the panoply of administrative and judicial tools available"); 126 CONG. REC. 26,388 (1980) (remarks of Rep. Florio) (emphasis added) (CERCLA provides "a strong incentive both for prevention of releases and *voluntary* cleanup of releases by responsible parties").

Both this Court and other courts previously have recognized that the statute contemplates and encourages voluntary cleanups. *See Union Gas*, 491 U.S. at 21-22 (plurality opinion of Brennan, J.) (emphasis added) (Congress "allow[ed] private parties who *voluntarily* cleaned up hazardous-waste sites to recover a

proportionate amount of the costs of cleanup from other [PRPs]"), *overruled on other grounds*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Fisher Dev. Co. v. Boise Cascade Corp.*, 37 F.3d 104, 112 n.2 (3d Cir. 1994) (referring to Congress's "goal of encouraging voluntary cleanup efforts" and citing to both Section 107(a) and Section 113(f)(1)); *Atl. Research*, 459 F.3d at 837.

The Third Circuit thought it significant that it had "not found evidence in the legislative history that Congress contemplated th[e statute] would extend a contribution right to PRPs engaged in entirely voluntary cleanups." App., *infra*, 40a. The issue, however, is not whether Congress intended to "extend" this cause of action but rather whether it sought to eliminate this existing right. Moreover, given the other indications of congressional intent in the text, background, and purposes of CERCLA, it was unnecessary for Congress to state this principle in *haec verba* in the legislative history. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (Congress is not required to state in legislative history that which is otherwise clear); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 n.2 (1992) (same); *Whitfield v. United States*, 543 U.S. 209, 215-16 (2005) (rejecting interpretation based on argument that "the history contains no indication . . . [of what] Congress meant").

What is more, the Third Circuit overlooked the limitations on settlements. For example, settlements are not cost-free. They take time, which could delay investigatory or remedial activities and impede cleanup actions that would be more effective if implemented immediately. Likewise, they take resources to negotiate, including the time of both company representatives and government officials. Indeed, federal and state governments often devote their personnel to pursuing investigations, enforcement, and cleanups rather than to negotiating settlements; if voluntary cleanups are discouraged in favor of settlements, the result would be that far fewer sites would be cleaned up. In short, these transaction costs can discourage negotiations, hinder

the clean-up process, and consume resources that are better spent on the cleanups themselves.

In addition, even if cleanups pursuant to negotiated settlements are desirable, such settlements are not always obtainable for a variety of reasons. It is impossible to believe — and the Third Circuit cited no support in the text, history, or purposes of CERCLA — that Congress would have intended to require PRPs in that situation to forgo voluntary cleanups, do nothing, and await administrative enforcement or judicial litigation. Indeed, for Congress to prefer that course would verge on the absurd.

The Third Circuit also stated that EPA disfavors voluntary cleanups, but that is simply not the case. EPA has often lauded voluntary cleanup efforts and even expressed concern that *Cooper* might reduce the incentive for voluntary cleanups. App., *infra*, 73a-74a (Sloviter, J., dissenting). In fact, in 1984 — immediately preceding the drafting and consideration of the 1986 SARA amendments — EPA stated that it was "preferable for private parties to conduct cleanups themselves" and therefore endeavored to "remove or minimize if possible the impediments to voluntary cleanup." Lee M. Thomas & F. Henry Habicht II, U.S. EPA, Interim CERCLA Settlement Policy (OSWER Directive No. 9835.0) (1984); *see also* 48 Fed. Reg. 40,658, 40,661 (Sept. 8, 1983) (referring to "[v]oluntary or negotiated cleanup" and stating that EPA does "not intend[ ] to preclude responsible parties from taking voluntary response actions outside of a consent agreement"); 55 Fed. Reg. 8666, 8792-8793 (Mar. 8, 1990) ("EPA believes it is important to encourage private parties to perform voluntary cleanups of sites and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination"). Moreover, even if EPA held the views ascribed to it by the Third Circuit, there is no indication that those views were known to, let alone accepted by, Congress – as the Third Circuit acknowledged. *See* App., *infra*, 54a.

The Third Circuit estimated that approximately *70%* of all cleanups are undertaken voluntarily. App., *infra*, 36a-37a. Furthermore, as stated by the Superfund Settlements Project and the American Chemistry Council as *amici curiae* below, the Third Circuit's decision would "discourage and delay the cleanup of contaminated sites around the country" — cleanups that are "heavily dependent on voluntary and cooperative action by the private sector." Am. Br. 3-4. These deleterious consequences, affecting critically important cleanup efforts at innumerable sites, should not be borne based on the Third Circuit's decision.

3. The Third Circuit's rejection of a Section 107(a) cause of action puts the United States in a preferred position over other PRPs and therefore is inconsistent with congressional intent.

The Third Circuit's decision favors the United States over other PRPs. App., *infra*, 28a n.18, 56a-57a n.31. In this way, it departs from a central purpose of CERCLA to treat all PRPs, including the government, in the same way. The Eighth Circuit squarely rejected that outcome. *See Atl. Research*, 459 F.3d at 837.

Section 120(a)(1) of CERCLA expressly provides that the United States is to be liable "in the same manner and to the same extent . . . as any nongovernmental entity, including liability under [Section 107]." 42 U.S.C. § 9620(a)(1). *See also Union Gas*, 491 U.S. at 10; *FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833, 840-41 (3d Cir. 1994) (en banc). However, the United States occupies a unique position: it is both an enforcer of environmental laws (usually through EPA) and a PRP (usually one of the military services) liable under the environmental laws. In fact, EPA has long been prohibited from proceeding under CERCLA against other federal agencies (*see* Exec. Order No. 12,580, § 4(a), 52 Fed. Reg. 2923 (Jan. 23, 1987)), and in practice the Department of Justice does not permit EPA to sue or issue cleanup orders to other federal agencies. The Third

Circuit's decision, by precluding a PRP's Section 107 action against the United States in the circumstances presented here, means that the government can avoid cleanup liability for CERCLA violations simply by choosing not to enforce the law against itself – exactly contrary to the congressional purpose in Section 120(a) to put the United States on an equal liability footing with private PRPs. This result is particularly problematic in light of the policy of Section 120(a) because the United States, unlike private PRPs, cannot be sued under state law in state courts; the result of the decision below, therefore, is to remove the only available forum in which to hold the government accountable, thereby enabling it to escape liability altogether.

In sum, the Third Circuit's decision allows the United States to avoid its fair share of cleanup costs under CERCLA – a liability that the government itself has described as "massive." *FMC*, 29 F.3d at 846. Such a result is contrary to Congress's intent in Section 120(a) and, as the Eighth Circuit observed, is an "absurd and unjust outcome" that "would eviscerate CERCLA whenever the government, itself, was partially responsible for a site's contamination." *Atl. Research*, 459 F.3d at 837.

B. Alternatively, An Implied Cause Of Action Exists Under Section 107(a).

For the foregoing reasons, petitioners submit that Section 107(a) provides an express cause of action. In the event, however, the Court concludes otherwise, an implied cause of action should, in the alternative, be held to exist under Section 107(a). As the Court recognized in *Cooper*, such a right is not lightly to be implied. *See* 543 U.S. at 162, 170-71; *but see Musick, Peeler & Garrett v. Employees Ins. of Wausau*, 508 U.S. 286 (1993) (implying federal right to contribution under securities law). But, as demonstrated *infra*, the standard for an implied cause of action is satisfied here. *See Key Tronic*, 511 U.S. at 816, 818 n.11; *Cooper*, 543 U.S. at 172-74 (Ginsburg, J., dissenting); *Atl. Research*, 459 F.3d at 835-36 (upholding, in the alternative, an implied cause of action under Section 107).

In determining whether a federal statute impliedly creates a cause of action, the "ultimate question" is "whether Congress intended to create the private remedy . . . that the plaintiff seeks to invoke." *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. at 91 (1981). This issue "is one of statutory construction," and "[f]actors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies." *Id.*

Here, all of these factors support an implied cause of action. As previously explained, the language of Section 107(a)(4)(B) and the savings clause in Section 113(f)(1) clearly indicate that a PRP, even though not subject to a civil action under Sections 106 or 107 and therefore not entitled to sue under Section 113(f)(1) as construed in *Cooper*, should be entitled to recover an equitable share of cleanup costs from other PRPs. *See* pages 15-18, *supra*. Likewise, the legislative history recognizes the existence of such a right of action. *See* page 19, *supra*. Similarly, this right is essential to promote CERCLA's two fundamental objectives of encouraging the prompt and voluntary cleanup of contaminated sites and imposing the costs of the cleanup on all parties responsible for the contamination. *See* pages 19-20, *supra*. Finally, CERCLA unquestionably constitutes (as its title indicates) a comprehensive federal scheme that is independent of state law. *See Key Tronic*, 511 U.S. at 814.

For these reasons, this case is entirely different from *Northwest Airlines* and other decisions where the Court rejected an implied cause of action. *See Cooper*, 543 U.S. at 174 n.2 (Ginsburg, J., dissenting) ("[a] determination suitable in one statutory context does not necessarily carry over to a different statutory setting"). Indeed, prior to the passage of SARA in 1986, "numerous cases . . . interpreted . . . § 9607 . . . to impliedly authorize such a cause of action." *Key Tronic*, 511 U.S. at 816; *see also Cooper*, 543 U.S. at 162; *Atl. Research*, 459 F.3d at 831-32; pages 3-4, *supra*. Furthermore, because CERCLA

plainly embodies a scheme to reallocate cleanup costs among responsible parties, Section 107 was "enacted for the special benefit of a class [PRPs] of which [the plaintiff] is a member." *Northwest Airlines*, 451 U.S. at 92.

C. In The Alternative, A Cause Of Action Arises Under Federal Common Law.

In the alternative to Section 107(a), a cause of action exists under federal common law. Federal common law arises in "essentially two categories: those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' . . . and those in which Congress has given the courts the power to develop substantive law." *Texas Indus., Inc. v. Radcliff Materials*, 451 U.S. at 640 (1981) (citations omitted). Both circumstances are present here. *See Atl. Research*, 459 F.3d at 836 n.9 (reserving the issue).

First, the cause of action at issue here involves uniquely federal interests. CERCLA constitutes a *comprehensive and uniform federal* scheme entirely separate from state law. *See Key Tronic*, 511 U.S. at 814; *Atl. Research*, 459 F.3d at 830 ("CERCLA effectively transformed centuries of real property and tort liability law"); 126 CONG. REC. H11,787 (statement of Rep. Florio) (Dec. 3, 1980) (referring to "the development of a uniform rule of [federal] law"). The paramount federal interest in a comprehensive and uniform system for cleaning up contaminated sites, including the critical question of contribution that directly affects the achievement of Congress's objectives (*see* pages 19-20, *supra*), supports application of federal common law. *See, e.g., Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 508 (1988); *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972). In fact, prior to SARA, federal courts upheld a PRP's right to contribution against other PRPs as a matter of federal common law. *See Cooper*, 543 U.S. at 161-62; *Atl. Research*, 459 F.3d at 831; pages 3-4, 26, *supra*.

Furthermore, this case directly affects the rights and obligations of the United States as a PRP. In particular, the government is a PRP that could be sued, as in fact it was here,

to bear its fair share of the costs of cleanup. *See also* pages 3, 24-25, *supra* (discussing Section 120(a)'s waiver of the sovereign immunity of the United States). This, too, is a well-recognized circumstance for federal common law. *See, e.g., Boyle*, 487 U.S. at 504-06; *Texas Indus.*, 451 U.S. at 640-41 n.12.

Second, Congress intended that CERCLA issues be governed by federal law and that the courts would develop federal common law in order to implement CERCLA. *See, e.g., Texas Indus.*, 451 U.S. at 642-46. To begin with, Congress vested exclusive jurisdiction in the federal courts to adjudicate all disputes arising under CERCLA. *See* 42 U.S.C. § 9613(b). Congress also directed that contribution claims under Section 113(f)(1) "shall be brought in accordance with . . . the Federal Rules of Civil Procedure and *shall be governed by Federal law.*" 42 U.S.C. § 9613(f)(1) (emphasis added). Since Section 113(f)(1) does not address many of the legal rules applicable to such claims, Congress clearly contemplated a significant role for the courts in developing the substantive law of contribution, and the same role is appropriate in the analogous circumstances of this case.

CERCLA's legislative history evidences Congress's intent that the governing legal rules will be shaped by "traditional and evolving principles of common law." 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio); *see also* 126 CONG. REC. H11,787 (Dec. 3, 1980) (statement of Rep. Florio) ("[t]o encourage the development of a uniform rule of law, . . . the bill will encourage the further development of federal common law in this area"). For example, in omitting explicit provisions from the early versions of CERCLA that would have mandated both joint and several liability and contribution, Congress specifically left the development of these areas to the courts under "traditional and evolving principles of common law." *See United States v. USX Corp.*, 68 F.3d 811, 824 (3d Cir. 1995). Responding to the congressional invitation to create federal common law, the courts imposed joint and several liability in actions under Section 107. In later enacting Section 113 in SARA, Congress

acknowledged that the courts had counterbalanced the harshness of that joint and several liability that had been judicially created by recognizing a "concomitant right of contribution" that sprang from the very same common-law roots. H.R. REP. No. 99-253(I) at 79, *reprinted in* 1986 U.S.C.C.A.N. at 2861. And, significantly, the legislative history of SARA makes clear that, even after the first sentence of Section 113(f)(1) provided an express statutory right to contribution, Congress intended for the courts to continue to develop common-law principles to govern CERCLA contribution. *See, e.g.*, S. REP. No. 99-11, at 45 (1985) (after SARA, "[a]s with joint and several liability, contribution claims will be resolved pursuant to Federal common law"); H.R. REP. No. 99-253(I), at 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 2862 (same); H.R. REP. No. 99-253(III), at 18-19, *reprinted in* 1986 U.S.C.C.A.N. at 3041.

These circumstances readily distinguish cases such as *Northwest Airlines* and *Texas Industries* in which the Court declined to apply federal common law. In neither of those cases, unlike in the present case, was there any uniquely federal interest in a common-law right of contribution, or any indication that Congress intended the courts to develop federal common law, or any basis to conclude that such a cause of action was necessary to further the congressional purposes underlying the statute or protect a group intended to be benefited by the provision at issue. By contrast, CERCLA amply justifies a federal common-law cause of action for a PRP that cannot sue under Section 113(f)(1) to recover an equitable share of the cleanup costs from other responsible parties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 21, 2006

APPENDIX

APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED AUGUST 29, 2006

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2096

E.I. DUPONT DE NEMOURS AND COMPANY; CONOCO, INC.; SPORTING GOODS PROPERTIES, INC.,

Appellants

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF COMMERCE; UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE ARMY; UNITED STATES DEPARTMENT OF ENERGY; UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES DEPARTMENT OF THE NAVY.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 97-cv-00497
District Judge: Honorable William J. Martini

Argued April 17, 2006

Appendix A

Before SLOVITER, AMBRO and MICHEL,* *Circuit Judges.*

(filed: August 29, 2006)

OPINION OF THE COURT

AMBRO, *Circuit Judge.*

Appellants in this case are owners and operators of industrial facilities located throughout the United States that are contaminated with hazardous waste. They admit they are responsible for some of the contamination at these sites (which they cleaned up voluntarily), but allege the United States Government is also responsible for some part. They thus seek a ruling that the Government must contribute to them a share of the cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* Two of our precedents- New Castle County v. Halliburton NUS Corp., 111 F.3d 1116 (3d Cir.1997), and *Matter of Reading Co.*, 115 F.3d 1111 (3d Cir.1997)—limit their claim. *New Castle County* limits potentially responsible parties to an express cause of action for contribution under CERCLA § 113, 42 U.S.C. § 9613 (thus barring them from another type of claim called "cost recovery" under CERCLA § 107(a), 42 U.S.C. § 9607(a)).[1] *Reading* held that § 113 also replaced

* Honorable Paul R. Michel, Chief Judge, United States Court of Appeals for the Federal Circuit, sitting by designation.

1. Because almost all relevant cases refer to the sections of CERCLA rather than the codification of those sections in the United States Code, we generally follow suit, except for the initial reference to a new section of the statute.

any implied or common law causes of action for contribution by potentially responsible parties with an exclusive statutory remedy.

In *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004), the Supreme Court held that § 113 by its express terms is not available to parties that clean up sites voluntarily. Appellants now ask that we decide whether, in light of *Cooper Industries*, our decisions in *New Castle County* and *Reading* limiting contribution to § 113 should be reconsidered to allow them to clean up their sites voluntarily and still share the costs with others. We conclude that *Cooper Industries* does not give us cause to reconsider our precedents here. Hence, because appellants are themselves partly responsible for the contamination at the subject sites, and their cleanups were voluntary, they may not seek contribution from other potentially responsible parties (including the Government).

I. Legal Framework

Before considering the factual background and procedural history of this case, it is necessary first to understand the applicable legal framework. In 1980, Congress enacted CERCLA to remedy the "serious environmental and health risks posed by pollution." *United States v. Bestfoods*, 524 U.S. 51, 55, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). CERCLA is a broad remedial statute that "grants the President . . . power to command government agencies and private parties to clean up hazardous waste sites," *Key Tronic Corp. v. United States*, 511 U.S. 809, 814, 114 S.Ct. 1960, 128

L.Ed.2d 797 (1994), and provides that "everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup," *Bestfoods*, 524 U.S. at 56 n. 1, 118 S.Ct. 1876 (emphasis and internal quotation marks omitted); *see Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 676 (3d Cir.2003) (noting that "[t]wo of the main purposes of CERCLA are prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party" (internal quotation marks omitted)). Unfortunately, "CERCLA is not a paradigm of clarity or precision [due to] inartful drafting and numerous ambiguities attributable to its precipitous passage." *Artesian Water Co. v. Gov't of New Castle County*, 851 F.2d 643, 648 (3d Cir.1988); *see also Exxon Corp. v. Hunt*, 475 U.S. 355, 363, 106 S.Ct. 1103, 89 L.Ed.2d 364 (1986) (noting that many CERCLA provisions are "not . . . model[s] of legislative draftsmanship," and are "at best inartful and at worst redundant"). As one court has noted, "wading through CERCLA's morass of statutory provisions can often seem as daunting as cleaning up one of the sites the statute is designed to cover." *CadleRock Props. Joint Venture, L.P. v. Schilberg*, No. 3:01CV896, 2005 WL 1683494, at *5 (D.Conn. July 19, 2005).

This case requires us to dive head-first into a particularly convoluted area of the law: apportionment of cleanup costs among potentially responsible parties ("PRPs").[2] *See Artesian*

2. "Potentially responsible party" and "PRP" are not used in CERCLA, but rather are terms of art used by courts and the federal Environmental Protection Agency ("EPA") to refer to parties that potentially bear some liability for the contamination of a site. (Cont'd)

Water, 851 F.2d at 648 (noting that CERCLA's "difficult[ies][are] particularly apparent in the response costs area"). Several sections of CERCLA are relevant to this issue.

A. Sections 106 and 107

Under CERCLA § 106(a), 42 U.S.C. § 9606(a) the United States may take action to "secure such relief as may be necessary to abate" a "substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." CERCLA § 107(a), 42 U.S.C. § 9607(a), defines "covered persons" who are liable for these and other costs as:

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

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(Cont'd)

See, e.g., New Castle County, 111 F.3d at 1120 n. 2; *see also United States v. E.I. DuPont de Nemours & Co., Inc.*, 432 F.3d 161, 182-83 (3d Cir.2005) (*en banc*) (Rendell, J., dissenting) (citing EPA policy manuals). *But see Consol. Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 97 n. 8 (2d Cir.2005) (criticizing the use of " 'potentially responsible person' and 'PRP' " because they "do not appear anywhere in the text of . . . CERCLA" and are "vague and imprecise," and relying instead on an "alternative designation-a party that, if sued, would be held liable . . .").

> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. . . .

CERCLA § 107(a)(1)-(4). These covered persons "shall be liable for":

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe, not inconsistent with the [N]ational [C]ontingency [P]lan;[3]
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

3. The National Contingency Plan is "a set of regulations promulgated by the EPA that establishes procedures and standards for responding to releases of hazardous substances, pollutants and contaminants." *New Castle County*, 111 F.3d at 1120 n. 2 (citing 42 U.S.C. § 9605 and 40 C.F.R. pt. 300).

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id. § 107(a)(4)(A)-(D).

B. Section 113

In 1986, Congress passed the Superfund Amendments and Reauthorization Act ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613. SARA amended CERCLA to add CERCLA § 113, 42 U.S.C. § 9613, which provides, in subsection (f)(1):

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [CERCLA § 107(a)] of this title, during or following any civil action under section 9606 [CERCLA § 106] of this title or under section 9607(a) [CERCLA § 107(a)] of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 [CERCLA § 106] of this title or section 9607 [CERCLA § 107] of this title.

CERCLA § 113(f)(1). The section also provides that: (1) a PRP that "has resolved its liability to the United States or a State in an administrative or judicially approved settlement" is immune from claims for contribution from other PRPs "regarding matters addressed in the settlement," *id.* § 113(f)(2); (2) a settling PRP can seek contribution from other non-settling PRPs, *id.* § 113(f)(3)(B); and (3) the statute of limitations for an action under § 107(a) is six years, while the statute of limitations for an action under § 113(f)(1) is only three years, *id.* § 113(g).

C. Section 120

CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1), also enacted as part of the 1986 SARA amendments, contains a broad waiver of the United States' sovereign immunity, providing that "[e]ach department, agency, and instrumentality of the United States" is subject to CERCLA's provisions "in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 [CERCLA § 107] of this title." *See FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833, 840 (3d Cir.1994) (*en banc*) ("[W]hen the government engages in activities that would make a private party liable [under CERCLA] if the private party engaged in those types of activities, then the government is also liable. This is true even if no private party could in fact engage in those specific activities." (emphases omitted)).

D. Evolution of Liability Under CERCLA and SARA

1. *Pre-SARA Liability: Implied Contribution Rights*

Prior to the enactment of the SARA amendments in 1986, several courts held that CERCLA exposed PRPs to joint and several liability, and that this implied a right of contribution among joint tortfeasors. *See, e.g., United States v. S.C. Recycling & Disposal, Inc.*, 653 F.Supp. 984, 994 (D.S.C.1986), *vacated in part on other grounds sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir.1988); *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 807-08, 810 (S.D.Ohio 1983). Innocent parties were allowed to recover their full response costs from any PRP under § 107(a)(4)(B), *see Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 889, 891-92 (9th Cir.1986); *Walls v. Waste Res. Corp.*, 761 F.2d 311, 317-18 (6th Cir.1985), and PRPs were allowed contribution pursuant to either an implied cause of action under § 107, *see City of Phila. v. Stepan Chem. Co.*, 544 F.Supp. 1135, 1142-43 (E.D.Pa.1982), or the common law, *see United States v. New Castle County*, 642 F.Supp. 1258, 1267-69 (D.Del.1986) (hereafter " NCC"); *Colorado v. ASARCO, Inc.*, 608 F.Supp. 1484, 1489-90, 1491 (D.Colo.1985). As the Supreme Court has explained, these cases allowed private parties, including PRPs, to seek contribution for costs incurred in forced or voluntary cleanups. *See, e.g., Cooper Indus.*, 543 U.S. at 161-62, 125 S.Ct. 577 (citing cases); *Reading*, 115 F.3d at 1118-19 (same, and noting that, "[u]ntil the passage of SARA in 1986, the judicially[ ] created expansion of § 107(a)(4)(B) served as the sole means by which parties could obtain contribution").

2. *Post-SARA Liability: Cost Recovery and Contribution Actions*

Following the passage of SARA and the inclusion of § 113 in CERCLA (which specifically provides contribution rights), courts retreated from implied causes of action for PRPs to seek contribution under § 107(a). Instead, they interpreted §§ 107 and 113 as establishing two "clearly distinct" remedies: "cost recovery" under § 107(a), and "contribution" under § 113(f). *See, e.g., Cooper Indus.*, 543 U.S. at 163 & n. 3, 125 S.Ct. 577; *Morton Int'l*, 343 F.3d at 675 ("Accordingly, CERCLA and SARA together create two legal actions by which parties that have incurred costs associated with cleanups can recover some or all of those costs: (1) Section 107 cost recovery actions; and (2) Section 113 contribution actions.").

In *New Castle County*, we determined that a cost recovery action under § 107 is not available to a PRP.[4] Rather, "a section 107 action brought for recovery of costs may be brought only by *innocent* parties that have undertaken cleanups. *An action brought by a potentially responsible person is by necessity a section 113 action for contribution.*" *New Castle County*, 111 F.3d at 1120 (second emphasis added). We based our conclusion on the understanding that, although § 107 is not limited by its terms to innocent parties, the section "was designed to enable innocent persons who incur expenses cleaning up a site to recover their costs from potentially responsible persons," and thus "a potentially

4. The plaintiffs in *New Castle County* incurred response costs pursuant to an EPA consent decree that "requir[ed] them to finance and implement remedial action at the landfill." 111 F.3d at 1119.

responsible person does not experience section 107 injury and cannot obtain section 107 relief." *Id.* at 1122.[5] Indeed, because § 107 imposes strict, joint, and several liability on all PRPs for the costs of cleanup, a PRP allowed to bring a cost recovery action under § 107 against another PRP "could recoup *all* of its expenditures regardless of fault"—which, we noted, "strains logic." *Id.* at 1120-21 (emphasis in original). Moreover, we concluded that it made little sense to allow a PRP the choice of proceeding under either § 107 or § 113, because parties would always choose § 107 (which allows recovery based on joint and several liability with a six-year statute of limitations) over § 113 (which allows recovery based on equitable apportionment of costs with a three-year statute of limitations), thus "render [ing] section 113 a nullity." *Id.* at 1123.[6]

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5. Of course, § 107 also renders PRPs liable to federal and state governments and Indian tribes, and thus those parties (acting in their enforcement capacity, and not as PRPs) may bring § 107 cost recovery actions as well. *See* CERCLA § 107(a)(4)(A); *New Castle County*, 111 F.3d at 1123 (noting that "section 107 historically has been used by governments to recover costs incurred in the clean-up of hazardous sites").

6. Numerous other Courts of Appeals considering this issue have reached the same result. *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-424 (2d Cir.1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349-356 (6th Cir.1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir.1998); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-06 (9th Cir.1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 & n. 7 (11th Cir.1996); *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1534-1536 (10th Cir.1995); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 98-103 (1st Cir.1994); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir.1994).

In *Reading*, decided a few weeks after *New Castle County*, we held that a PRP also may not invoke the pre-SARA implied cause of action for contribution under § 107.[7] Examining the legislative history of § 113, we noted that the section was intended to " 'clarif[y] and confirm[ ] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.' " *Reading*, 115 F.3d at 1119 (quoting S.Rep. No. 99-11, at 44 (1985)) (alterations in original); *see also New Castle County*, 111 F.3d at 1122 (same, quoting H.R.Rep. No. 99-253(I), at 79 (1985), U.S.Code Cong. & Admin.News 1986 pp. 2835, 2861). Based on the statute's language, the legislative history, relevant case law, and "the fact that § 113(f)(1) specifically permits an action for contribution to be brought 'in the absence of a civil action under . . . section [107],' " *Reading*, 115 F.3d at 1120 (alterations in original),[8] we held that, "[i]n passing § 113(f), Congress acted to codify existing federal common law and to replace the judicially crafted measure with an express statutory remedy." *Id.* at 1119.

Thus we concluded that "Congress intended § 113 to be the *sole* means for seeking contribution." *Id.* at 1120

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7. The plaintiff in *Reading* incurred response costs pursuant to an EPA cleanup order under § 106 and a corresponding suit under § 107. 115 F.3d at 1116.

8. As noted below, insofar as this quoted passage from *Reading* implies that § 113(f)(1) contribution is available without a preexisting suit, the Supreme Court ruled otherwise in *Cooper Industries*.

(emphasis added). It "replaced the judicially created right to contribution under § 107(a)(4)(B)" with an express (and exclusive) statutory remedy, *id. at 1119*, and also superseded common law remedies:

> [W]hen Congress expressly created a statutory right of contribution in CERCLA § 113(f), 42 U.S.C. § 9613(f), it made that remedy a part of an elaborate settlement scheme aimed at the efficient resolution of environmental disputes. Permitting independent common law remedies would create a path around the statutory settlement scheme, raising an obstacle to the intent of Congress. We conclude therefore that [the plaintiff's] common law claims are preempted by CERCLA § 113(f).

Id. at 1117.

In so holding, we acknowledged *dicta* in the Supreme Court's decision in *Key Tronic* that " § 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs," 511 U.S. at 818, 114 S.Ct. 1960, and that CERCLA "expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107," *id.* at 816, 114 S.Ct. 1960. *See Reading*, 115 F.3d at 1120. We determined, however, that the "overlap" consisted of the fact that (as *New Castle County* held) an innocent private party (most likely a landowner who purchased land that had been contaminated by others) may bring a *cost recovery* action under § 107 holding a PRP jointly and severally liable for the full cost of

the cleanup. *Reading*, 115 F.3d at 1120. "The fact, however, that a direct action might be brought under § 107(a) [by an innocent landowner against a PRP] does not open the door for [the] PRP to bring an action for contribution [against other PRPs] under that same section." *Id.*

In sum, after SARA introduced the § 113 contribution provision, our Court and other courts concluded that §§ 107 and 113 were complementary (but not really "overlapping," as the Supreme Court had suggested in *Key Tronic*) remedies. Section 107 allowed the Government or an innocent landowner to recover the full cost of cleanup from a PRP on the basis of strict, joint, and several liability. The PRP could then seek contribution from other PRPs under § 113(f)(1). Moreover, according to the understanding at that time (as intimated in *Reading*), § 113(f)(1) allowed a PRP to seek contribution even in the absence of an action under § 106 or § 107; in other words, a PRP that voluntarily cleaned up a contaminated site *sua sponte* could seek contribution from other PRPs without waiting for an enforcement action, a Government or innocent-landowner cost recovery suit, or a settlement of liability.

3. *Cooper Industries*

In *Cooper Industries*, the Supreme Court significantly altered this understanding. The Court held that the plain language of § 113(f)(1) (*i.e.*, "Any person may seek contribution from any other person who is liable or potentially liable under section [107] of this title, during or following any civil action under section [106] of this title or under section [107] of this title.") required a pre-existing civil action

(either pending or completed) against the PRP under § 106 or § 107 *before* the PRP could seek contribution from other PRPs. The Court concluded that, "if § 113(f)(1) were read to authorize contribution actions at any time, regardless of the existence of a § 106 or § 107(a) civil action, then Congress need not have included the explicit 'during or following' condition" in § 113(f)(1). *Cooper Indus.*, 543 U.S. at 166, 125 S.Ct. 577. Thus, a PRP may only seek contribution under § 113(f)(1) if it is the subject of a § 106 or § 107 civil action or has been adjudged liable as a result of such an action. *Id.* [9]

The Court also considered the so-called "saving clause" of § 113(f)(1) ("Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] of this title or section [107] of this title."). We relied on this sentence in *Reading* when we said that § 113(f)(1) "specifically permits" a PRP to seek contribution from other PRPs without a pre-existing action under § 106 or § 107. 115 F.3d at 1120. Insofar as this statement implied that § 113(f)(1) permitted such an action, the Supreme Court disagreed, noting that "[t]he sole function of the [saving clause] is to clarify that § 113(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may exist *independently* of § 113(f)(1)." *Cooper Indus.*, 543 U.S. at 166, 125 S.Ct. 577 (emphasis added). As the Court explained,

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9. The Court also noted that, under § 113(f)(3)(B), a PRP that has settled its liability to the federal or a state government also has a right to seek contribution. That right, the Court noted, is "a separate express right of contribution" independent of § 113(f)(1). *Cooper Indus.*, 543 U.S. at 163, 125 S.Ct. 577.

> the sentence [*i.e.*, the saving clause] rebuts any presumption that the express right of contribution provided by the enabling clause [in § 113(f)(1)] is the exclusive cause of action for contribution available to a PRP. The sentence, however, does not itself establish a cause of action; nor does it expand § 113(f)(1) to authorize contribution actions not brought "during or following" a § 106 or § 107(a) civil action; nor does it specify what causes of action for contribution, if any, exist outside § 113(f)(1). Reading the saving clause to authorize § 113(f)(1) contribution actions not just "during or following" a civil action, but also before such an action, would again violate the settled rule that we must, if possible, construe a statute to give every word some operative effect.

Id. at 166-67, 125 S.Ct. 577.

The Court left open the questions of whether a PRP may seek cost recovery under § 107, and whether that section includes an implied cause of action for contribution on which a PRP may rely independently of § 113. With respect to the former question, the Court noted that numerous decisions from the Courts of Appeals, including this Court's decision in *New Castle County*, had held that a § 107(a) cost recovery action is only available to an innocent party, and concluded that the question had not been briefed to the Supreme Court and thus it was "more prudent to withhold judgment on these matters." *Cooper Indus.*, 543 U.S. at 169-70, 125 S.Ct. 577. While the Court did not reach the latter issue as well, it drew the litigants' attention to those cases in which "this Court

has visited the subject of implied rights of contribution before," *id.* at 170-71, 125 S.Ct. 577 (citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638-47, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981), and *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 90-99, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981)). It noted further that, "in enacting § 113(f)(1), Congress explicitly recognized a particular set (claims 'during or following' the specified civil actions) of the contribution rights previously implied by courts from provisions of CERCLA and the common law." *Id.* at 171, 125 S.Ct. 577.[10]

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10. In dissent, Justice Ginsburg relied heavily on the Court's *dicta* in *Key Tronic* that § 107 "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs," *see Key Tronic*, 511 U.S. at 818, 114 S.Ct. 1960, a proposition she believed applied to PRPs. *Cooper Indus.*, 543 U.S. at 172, 125 S.Ct. 577 (Ginsburg, J., dissenting). She argued that "all Members of this Court agreed" that § 107 provided such a cause of action. *Id.* Indeed, Justice Scalia's dissent in *Key Tronic* focused merely on whether the cause of action was express (as he believed it was) or implied (as the majority stated). *See Key Tronic*, 511 U.S. at 822, 114 S.Ct. 1960 (Scalia, J., dissenting in part). Justice Ginsburg thus concluded that "no Justice [in *Key Tronic*] expressed the slightest doubt that § 107 indeed did enable a PRP to sue other covered persons for reimbursement, in whole or part, of cleanup costs the PRP legitimately incurred," and thus would have recognized a cause of action for PRPs to seek contribution under § 107. *Cooper Indus.*, 543 U.S. at 172, 174, 125 S.Ct. 577 (Ginsburg, J., dissenting).

Justice Ginsburg's conclusion presumes, however, that the "private parties" the Court agreed in *Key Tronic* had a cause of action under § 107 included PRPs seeking contribution from other PRPs, and not merely (as we held in *Reading* and *New Castle County)*

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II. Facts and Procedural History

With this context, we turn to the facts of this case. Appellants E.I. DuPont de Nemours & Co., ConocoPhillips Co., and Sporting Goods Properties, Inc. (collectively "DuPont" or "appellants")[11] appeal from a March 1, 2004 order of the United States District Court for the District of New Jersey granting the United States judgment on the pleadings and denying DuPont's motion for judgment under Federal Rule of Civil Procedure 54(b) and its request for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). This order rested on an earlier opinion and order, entered on December 30, 2003, granting the Government summary judgment in a "test case" brought to determine whether DuPont had a cause of action against the Government for contribution under CERCLA.[12] DuPont asserts the District

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innocent private parties seeking cost recovery from PRPs on a joint and several basis. The *Cooper Industries* majority appears to agree with our view, retreating significantly from its earlier *dicta* and noting that, although the *Key Tronic* majority spoke of " 'similar and overlapping' remedies[,] . . . [t]he cost recovery remedy of § 107(a)(4)(B) and the contribution remedy of § 113(f)(1) are similar at a general level in that they both allow private parties to recoup costs from other private parties[, b]ut the two remedies are clearly distinct." *Cooper Indus.*, 543 U.S. at 163 n. 3, 125 S.Ct. 577.

11. Because DuPont was the only plaintiff at issue in the "test case" litigated before the District Court, we refer to the parties in most instances as "DuPont." Insofar as the identity of parties other than DuPont is relevant, we refer to the parties as "appellants."

12. The District Court's December 30, 2003 order was superseded by an amended order on January 8, 2004. For purposes of this appeal, the orders are substantively identical.

Court erred in its statutory analysis, that an implied cause of action exists under federal common law, and that the District Court mistakenly dismissed all claims (and not just the test case) on the pleadings.

A. Background

This case concerns fifteen facilities owned by appellants in several states, including New Jersey.[13] Each of the sites is contaminated with hazardous waste, and was owned or operated by the United States at various times during World War I, World War II, and/or the Korean War, during which time the United States was responsible for some contamination.

Appellants brought an action against the United States in January 1997 (before the Supreme Court's decision in *Cooper Industries*) seeking contribution from the Government toward the costs of cleanup at the sites. Initially, the complaint alleged causes of action under CERCLA § 107(a) (cost recovery) and § 113(f)(1) (contribution).[14] We

13. The facilities include DuPont sites in Pompton Lakes, New Jersey; Newark, New Jersey; Parlin, New Jersey; Carneys Point, New Jersey; Gibbstown, New Jersey; Buffalo, New York; Niagara, New York; Niagara Falls, New York; East Chicago, Indiana; Louisville, Kentucky; Nashville, Tennessee; Spruance, Virginia; and Belle, West Virginia; a ConocoPhillips site in Ponca City, Oklahoma; and a Sporting Goods Properties site in Bridgeport, Connecticut.

14. The complaint also included a separate count seeking "recoupment" of costs, but did not provide any statutory basis for this claim. This count was voluntarily dismissed in December 1997. *See E.I. DuPont de Nemours & Co. v. United States*, 297 F.Supp.2d 740, 743 (D.N.J.2003).

decided *New Castle County* and *Reading* in May and June 1997, respectively; in keeping with those holdings, appellants' § 107(a) claim was voluntarily dismissed without prejudice. *See E.I. DuPont de Nemours & Co. v. United States*, 297 F.Supp.2d 740, 742-43 (D.N.J.2003). The District Court thereafter designated one of the facilities named in the complaint-the DuPont facility in Louisville, Kentucky-as a "test case" to determine whether DuPont (which had voluntarily undertaken to clean up the site without a preexisting § 106 or § 107 action or a § 113(f)(3) settlement) could seek contribution from other PRPs under § 113(f)(1). Full discovery was had regarding the claims related to the Louisville facility, and the Government moved for summary judgment under Federal Rule of Civil Procedure 56 on the ground that, as a PRP that had voluntarily incurred its cleanup costs without having been sued or settled its liability, DuPont had no cause of action for contribution under § 113.

B. First District Court Decision

On December 30, 2003, the District Court issued a lengthy opinion and order granting the Government's motion for summary judgment with respect to the Louisville facility. *See E.I. DuPont*, 297 F.Supp.2d 740. The Court concluded that a PRP, like DuPont, could only bring a contribution action in three circumstances: (1) during or following a civil action against the PRP under § 106 or § 107 (as set forth in § 113(f)(1)); (2) after the PRP entered into a judicially or administratively approved settlement of its liability (as set forth in § 113(f)(3)(B)); or (3) as suggested by the "saving clause," in some other undefined contribution action. *Id.* at 747. Since DuPont had not been sued under § 106 or § 107,

and had not settled its liability with respect to the Louisville facility, the Court considered whether it could pursue some other contribution action.

It noted that the saving clause should not be read to allow a contribution action, regardless of its source (such as "some other (federal or state) statute," *id.* at 750), unless the plaintiff satisfied the "requirements of a traditional, common law contribution action." *Id.* at 751; *see also Reading*, 115 F.3d at 1124 (noting that the term "contribution" in CERCLA is used "in its traditional, common law sense"). Such an action " 'exists only in favor of a tortfeasor who has *discharged* the *entire* claim for the harm by paying more than his equitable share of the common liability.' " *E.I. DuPont*, 297 F.Supp.2d at 746 (quoting Restatement (Second) of Torts § 886A(2)) (emphases in original). Moreover, the District Court concluded that "a contribution action requires (at least) a prior or ongoing *lawsuit*," *id.* at 749 (emphasis in original), and DuPont's claim regarding the Louisville facility did not meet these criteria.

The Court concluded that "the purpose of the so-called saving clause [in § 113(f)(1)] was to clarify that a contribution action brought following a settlement under the aegis of Section 113(f)(3) should not be held to be procedurally insufficient because of an absence of a prior primary action brought pursuant to CERCLA Sections 106 or 107." *Id.* at 754 (emphasis omitted).[15] It granted the Government's motion for summary judgment on this basis.[16]

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15. The Court noted the possibility that the saving clause was intended to preserve causes of action for contribution arising from non § 113 CERCLA provisions without a prior settlement or suit, (Cont'd)

C. Second District Court Decision

On March 1, 2004, the District Court issued another opinion and order granting the Government judgment on the pleadings under Federal Rule of Civil Procedure 12(c) with respect to the other fourteen sites mentioned in appellants' complaint, and denying appellants' request for judgment under Federal Rule of Civil Procedure 54(b) or certification of an interlocutory appeal from the Court's prior order. The Court noted that, although appellants' lawyers represented they " 'could amend the Complaint to potentially comply' " with the Court's earlier opinion—by, for example, showing that they incurred cleanup costs at some of the sites pursuant to EPA orders or consent decrees—"[a] party's lawyer's

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but concluded that, under this Court's decision in *Reading* that § 113 displaced all pre-SARA common law or implied rights of action for contribution under sections other than § 113, such an interpretation was not persuasive. *E.I. DuPont*, 297 F.Supp.2d at 750.

16. The Court admitted that its holding would "limit the ability of some PRPs to recoup cleanup costs from other PRPs," and that this "might very well hamper some PRP efforts at removal and remediation of hazard[ous] waste sites." *E.I. DuPont*, 297 F.Supp.2d at 754. Indeed, the Court noted that if "the statute were ambiguous or if the Court believed that the meaning of the term 'contribution' were unsettled when Congress wrote the SARA amendments, then [it] would of necessity turn to the general purposes of the statute to determine the reach of the provision." *Id.* at 754-55. But the Court concluded that "the statute's terms appear reasonably clear," and thus any effort to allow contribution in the absence of a prior suit or settlement "would be rewriting the statute, [which] is not the Court's role." *Id.* at 755.

representation is not evidence [, and] this representation [does not] appear in the pleadings." *E.I. DuPont de Nemours & Co. v. United States*, No. 97-497, slip op. at 5 n. 4 (D.N.J. March 1, 2004). Indeed, the Court noted,

> [the] Complaint and the competent evidence before this Court do not establish or tend to establish that the fourteen remaining sites (unaffected by this Court's prior amended order) are in any material sense distinguishable from the Louisville site. Prior to and during briefing of the Government's current motion, Plaintiffs failed to produce *any* (record) evidence, in the form of affidavits, certifications, copies of agreements settling CERCLA claims, or records of prior judicial or administrative CERCLA § 106 orders or CERCLA § 107 proceedings. Even at oral argument, Plaintiffs did not seek leave to amend their Complaint or permission to make a late filing. Simply put, at this juncture, there is nothing in the record before this Court establishing or tending to establish with regard to any of the remaining sites that any Plaintiff (in the instant action) either has settled a CERCLA § 113(f)(3) claim or has been named a defendant in a (prior or on-going) CERCLA § 106 or CERCLA § 107 action.

Id. at 4-5 (emphasis in original) (footnote omitted).

The District Court thus concluded that the pleadings did not suggest any basis on which it could reach a conclusion

with respect to the fourteen other sites different from its conclusion with respect to the Louisville site, and therefore granted the Government judgment on the pleadings for all sites.

D. Appeal

DuPont and the other plaintiffs appealed, and we stayed briefing pending the Supreme Court's decision in *Cooper Industries*. As noted, the Supreme Court's decision confirmed the District Court's conclusion that contribution under § 113 is available to a PRP only if it settles its liability or is subject to a civil action under § 106 or § 107.

In light of *Cooper Industries*, DuPont raises four issues on appeal and makes the following arguments. First, it contends that § 107 expressly provides PRPs a cause of action to seek contribution from other PRPs independent of the remedy provided by § 113. Second, it asserts alternatively that such a cause of action is implied in § 107 or arises from federal common law. Third, it argues that the District Court erred in applying a multi-part test for contribution claims that is inconsistent with our Court's precedent. Fourth, it contends the District Court erred in granting the Government judgment on the pleadings with respect to the non-Louisville sites. For the reasons stated below, the District Court's December 30, 2003 order (as amended on January 8, 2004) is affirmed, and its March 1, 2004 order is also affirmed, with one exception that will be explained below.

III. Jurisdiction and Standard of Review

The District Court had subject matter jurisdiction over this case under 28 U.S.C. § 1331, and we have jurisdiction on appeal under 28 U.S.C. § 1291. We exercise plenary review of a district court's grant of summary judgment and judgment on the pleadings. *See Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 219-20 (3d Cir.2005). In conducting this review, all facts and inferences are construed in the light most favorable to the non-moving party, and "[j]udgment will not be granted unless the movant clearly establishes there are no material issues of fact, and he is entitled to judgment as a matter of law." *Id.* at 220. Our review of questions of statutory interpretation is also plenary. *United States v. E.I. DuPont de Nemours & Co., Inc.*, 432 F.3d 161, 164 (3d Cir.2005) (*en banc*).

IV. Availability of Contribution

Although DuPont would undoubtedly prefer that we write our decision on a blank slate in deciding whether it may seek contribution under § 107(a), we cannot do so. Rather, we must decide if our prior decisions in *New Castle County* and *Reading* control this case or are distinguishable. If they control, we must then decide whether our panel may decline to follow those precedents "in light of intervening authority even without en banc consideration." *George Harms Constr. Co. v. Chao*, 371 F.3d 156, 161 (3d Cir.2004). As we explain below, we hold that *New Castle County* and *Reading* control the outcome of this case, and no intervening

authority provides a basis sufficient to reconsider those precedents.[17]

A. Applicability of *New Castle County* and *Reading*

To repeat, *New Castle County* and *Reading* stand jointly for the proposition that a PRP seeking to offset its cleanup costs must invoke contribution under § 113; the express cause of action under § 107 (cost recovery) is limited to governments and Indian tribes (acting in their enforcement capacity) and innocent landowners, and no implied cause of action for contribution for PRPs-under either § 107 or the common law-survived the passage of § 113. This rule, unless factually distinguishable, controls the case before us.

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17. The Government contends that, because none of the appellants pursued express or implied causes of action for contribution under § 107(a) or federal common law in the District Court, these claims are waived on appeal. Appellants did, however, seek the relief they believed available to them under this Court's precedents. Since *Cooper Industries* had not been decided at the time final judgment was rendered by the District Court, there was no reason appellants should have thought it potentially useful to pursue a remedy under § 107(a)-that remedy was foreclosed by *Reading*, and the view at the time was that they had a cause of action under § 113. Regardless of whether their arguments regarding a cause of action under § 107(a) are ultimately persuasive, it is clear to us that *Cooper Industries* raised legal questions DuPont had no reason to ask before that decision. We will therefore exercise our discretion to consider DuPont's arguments on the merits. *See Salvation Army v. Dep't of Cmty. Affairs of N.J.*, 919 F.2d 183, 196 (3d Cir.1990) ("Where, as here, a previously ignored legal theory takes on new importance due to an intervening development in the law, it is appropriate for us to exercise our discretion to allow a party to revive that theory.").

Recently, the United States Court of Appeals for the Second Circuit decided *Consolidated Edison Co. of New York v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir.2005), which held that, despite a prior Second Circuit decision suggesting the contrary, a PRP has an implied cause of action for contribution under § 107. *See id.* at 100 & n. 11 (concluding that "section 107(a) permits a [PRP] that has not been sued or made to participate in an administrative proceeding . . . to recover necessary response costs incurred voluntarily," which the Court deemed "consistent with the view that courts took of section 107(a) before section 113(f)(1) was enacted"). The Second Circuit admitted that its earlier holding in *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir.1998)—which is substantively similar to our holdings in *New Castle County* and *Reading*—was inconsistent with this approach. Nonetheless, the panel "decline[d] to answer the question whether a three-judge panel of this court may depart from *Bedford Affiliates's* . . . holding." *Consol. Edison*, 423 F.3d at 101 n. 12. It noted that, as in *New Castle County* and *Reading* (but unlike in *Consolidated Edison* or this case), the plaintiff in *Bedford Affiliates* cleaned up its site pursuant to a consent order and sought relief under both § 107 and § 113.

Thus, the Court limited *Bedford Affiliates* "to hold that a party that has incurred or is incurring expenditures under a consent order with a government agency and has been found partially liable [for contribution] under § 113(f)(1) may not seek to recoup those expenditures under section 107(a)." *Id.* at 102. The Court concluded that its holding in *Consolidated Edison*—"that a party that has *not* been sued or made to participate in an administrative proceeding, but,

if sued, would . . . be liable under section 107(a), may still recover necessary response costs incurred voluntarily"—did not conflict with its understanding of *Bedford Affiliates*. *Id.* (emphases added).[18]

DuPont would have us adopt this reasoning to distinguish *New Castle County* and *Reading*. It argues that, as in *Bedford Affiliates*, both of our prior cases involved PRPs that cleaned up sites pursuant to some form of EPA oversight.[19] Tracking the analysis in *Consolidated Edison*, DuPont asserts that *New Castle County* and *Reading* are fundamentally different from this case (where appellants cleaned up their sites voluntarily),

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18. Shortly before we filed this opinion, the United States Court of Appeals for the Eighth Circuit decided *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir.2006), in which it reached the same result as the Second Circuit in *Consolidated Edison*. We note that *Atlantic Research* relies almost entirely on the reasoning of *Consolidated Edison*, and thus our consideration of the Second Circuit's case applies as well to the decision of the Eighth Circuit.

One important difference between the two cases is that in *Atlantic Research* (as here) the United States was a party. The Eighth Circuit based its decision, in part, on its conclusion that denying a PRP that voluntarily cleans up a site contribution from the Government would allow the Government to "insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." *Atlantic Research*, 459 F.3d at 836-37. As we explain in footnote 31 below, however, we are underwhelmed by this argument.

19. As noted, the *New Castle County* plaintiffs incurred response costs pursuant to an EPA consent decree, *see* 111 F.3d at 1119, and the *Reading* plaintiff cleaned up its site pursuant to a § 106 order and § 107 suit, *see* 115 F.3d at 1116.

because the rule in our prior cases may be limited factually to those circumstances where a PRP has already satisfied the prerequisites for § 113 contribution set forth in *Cooper Industries*.

We disagree. Although we will not dispute the Second Circuit's interpretation of its precedent, we do not read our precedents to be so limited. Nothing in *New Castle County* and *Reading* suggests that our holdings in those cases depended on the motivations for the cleanups. Indeed, we reached the § 107 and common law claims in those cases precisely because § 113 was not sufficient to dispose of the appeals. In *New Castle County,* for example, we noted that the circumstances of that case forced us to decide whether a PRP may seek cost recovery under § 107 (even if it would ordinarily qualify for contribution under § 113) because the respective statutes of limitations for the different types of claims meant that, on the facts of the case, a § 107 cost recovery action would have been timely but a § 113 contribution action would not. 111 F.3d at 1120. And in *Reading,* we necessarily considered whether *any* contribution claim (common law, implied in § 107, or express in § 113) could survive the discharge of a PRP's liability to the United States in a bankruptcy proceeding. We concluded that an express § 113 contribution claim was precluded by the fact that the Government's claim against the PRP was discharged by the PRP's bankruptcy, meaning there was no underlying action and thus other PRPs could not seek contribution from the debtor. *Reading,* 115 F.3d at 1126. We rejected the common law and implied cause of action claims because they were categorically precluded by the statute. *Id.* at 1117, 1120-21.

It is familiar law that when the rule in a prior case by its terms controls the outcome of a current case, we will not reach out to distinguish the prior case on the basis of factual differences that were not "material" to the earlier holding. As Judge Kozinski explained in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir.2001), common law precepts require that "a court confronted with apparently controlling authority must parse the precedent in light of the facts presented and the rule announced. Insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis." *Id.* at 1172; *see also United States v. Rosero*, 42 F.3d 166, 174 n. 16 (3d Cir.1994) (refusing the defendants' invitation to distinguish an earlier case because the precedent was not "materially distinguishable" from the facts at hand); *Black's Law Dictionary* 629 (8th ed.2004) (defining a "material fact" as one "that is significant or essential to the issue or matter at hand"). Our holdings in *New Castle County* and *Reading*-based on our interpretation of the statute-are broad, and nothing in those cases suggests that the results would have been different if the plaintiffs had undertaken voluntary cleanups.[20] We do not, therefore, believe our precedents may

20. At least one commentator has suggested that courts "do not concede to their predecessors the power of laying down very wide rules; they reserve to themselves the power to narrow such rules by introducing into them particular facts of the precedent case that were treated by the earlier courts as irrelevant." John Salmond, *Jurisprudence* 192 (10th ed.1947), *reprinted in Black's Law Dictionary* 507 (8th ed.2004). While this may be true as a general proposition, it cannot serve as a rule of decision in a case such as

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be distinguished from this case as the Second Circuit distinguished *Bedford Affiliates* from the circumstances of *Consolidated Edison*.

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this. First, even if a panel treated certain facts as "irrelevant" in a prior opinion, they must still be material to the earlier holding to serve as a basis for distinguishing the case, as our discussion above demonstrates. Second, and perhaps more importantly, our interpretation of CERCLA's requirements in *New Castle County* and *Reading* established that the plaintiffs in those cases lost *not* because they had been compelled to clean up their sites and hence qualified for contribution under § 113 (indeed, as explained, neither plaintiff could in fact seek § 113 contribution on the facts of those cases), but because their complaints alleged causes of action under § 107 or the common law that were not authorized by the statute for *any* PRP. Of course, our Court might still have ruled against the plaintiffs by interpreting CERCLA differently, but that is not the interpretation we deemed appropriate based on the terms of the statute.

Particularly in the statutory interpretation realm, where courts must faithfully apply Congress' words and determine their settled meaning, the breadth of a court's holding is often compelled by the scope of Congress' prescription. We therefore reject the argument that our holdings in *New Castle County* and *Reading* (that CERCLA precludes PRPs from seeking cost recovery or contribution under § 107, and establishes § 113 as the sole basis on which a PRP may equitably apportion its costs through contribution) are broader than they needed to be on the facts of those cases. To the contrary, those rules apply directly to this case, and may not be distinguished based on facts that were not material to the earlier decision, especially since the terms of the statute have not changed.

B. Continued Viability of *New Castle County* and *Reading* After *Cooper Industries*

We turn, then, to the question of whether we may nonetheless reconsider our precedents in light of intervening authority. In doing so, we are mindful of the Supreme Court's admonition that when "dealing with an issue of statutory interpretation, . . . the claim to adhere to case law is generally powerful once a decision has settled statutory meaning." *Shepard v. United States*, 544 U.S. 13, 23, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) ("[T]he burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

Because the statute itself has not changed, DuPont focuses its attention on *Cooper Industries*. Its arguments may be distilled to two intersecting theories. First, it argues that *Cooper Industries* undercut a supposed major premise of our holding in *Reading*—namely, that a PRP could seek contribution from another PRP without having been sued or settled its liability. Thus, DuPont contends that the analytical foundation of *Reading* was overruled by the Supreme Court and we may, therefore, disregard our prior decision. Second, it contends that *Cooper Industries* changed settled expectations in the cost apportionment field to such a

dramatic extent that the rules set out in *New Castle County* and *Reading* no longer serve the purposes of CERCLA. As such, DuPont argues, the intervening authority of *Cooper Industries*, when viewed in the light of CERCLA's legislative history, provides a basis for us to find an express or implied cause of action for contribution under § 107 or the common law notwithstanding our precedent.

1. *Alleged Inconsistency Between Cooper Industries and Reading*

a. Facial Inconsistency

Cooper Industries did not explicitly or implicitly overrule our precedents; indeed, the Supreme Court expressly declined to consider the very questions at issue here. *See Cooper Indus.*, 543 U.S. at 168-71, 125 S.Ct. 577. Though it is true that our observation in *Reading* that "§ 113(f)(1) specifically permits an action for contribution to be brought 'in the absence of a civil action under . . . section [107],'" 115 F.3d at 1120, cannot support a cause of action for PRPs engaged in voluntary cleanups after *Cooper Industries*, we reject DuPont's view that this fatally undermines *Reading's* holding. For one thing (as explained in Part IV.B. 1.b below), our statement in *Reading* did not necessarily endorse a § 113(f)(1) contribution action in the absence of a preexisting civil action (and is not, therefore, clearly at odds with the Supreme Court's later instructions). But insofar as our statement can be read to recognize implicitly that possibility, it merely "*reenforce[d]* our conclusion that Congress intended § 113 to be the sole means for seeking contribution." *Id.* (emphasis added). We also

relied on our precedent in *New Castle County*, the holdings of other Courts of Appeals, rules of statutory construction, and CERCLA's purpose following the SARA amendments, in deciding that § 113 provides the only contribution remedy under CERCLA. We conclude that, even disregarding the possible implicit reference in *Reading* to a § 113(f)(1) contribution action in the absence of a § 107 suit, our holding in that case was amply supported on other grounds and therefore survives *Cooper Industries*.

b. Saving Clause

It is true that *Reading's* statement-which quotes from § 113(f)(1)'s saving clause- *could* be read to endorse a contribution action under § 113(f)(1) without a preexisting civil action, and as such would be wrong. *See Cooper Indus.*, 543 U.S. at 167, 125 S.Ct. 577 (explaining that the saving clause "does [not] . . . expand § 113(f)(1) to authorize contribution actions not brought 'during or following' a § 106 or § 107(a) civil action"). But the Supreme Court also observed that while the saving clause "rebuts any presumption that the express right of contribution provided by the enabling clause [in § 113(f)(1)] is the exclusive cause of action available to a PRP," it does not "specify what causes of action for contribution, if any, exist outside § 113(f)(1)," and the Court did not itself address the question further. *Id.* at 166-67, 125 S.Ct. 577.

We do know, however, there is one express cause of action available to a PRP for contribution under CERCLA outside the strictures of § 113(f)(1): contribution under § 113(f)(3)(B) for PRPs that settle their liability "in an

administrative or judicially approved settlement." Our statement in *Reading* is not, therefore, necessarily incorrect: it is true that § 113(f)(1) does *not* foreclose contribution actions when the PRP has not been sued, because § 113(f)(3)(B) remains available if the party chooses to settle. As we explain below, SARA's legislative history makes clear that the § 113(f)(3)(B) settlement provision is one of two incentives that are crucial to a carefully considered scheme to encourage PRPs to settle their liability, enter into consent decrees, and perform supervised cleanups.[21] The District Court concluded that the § 113(f)(1) saving clause merely clarifies that "a contribution action brought following a settlement under the aegis of Section 113(f)(3) should not be held to be procedurally insufficient because of an absence of a prior primary action pursuant to CERCLA Sections 106 or 107." *E.I. DuPont*, 297 F.Supp.2d at 754 (emphasis omitted). As the discussion below demonstrates, this interpretation is consistent with the settlement provisions in SARA, and though there is no legislative history regarding the meaning of the saving clause, we are confident that the District Court's interpretation is in accord with CERCLA's purpose (as amended by SARA), as is our decision in *Reading*. We therefore decline DuPont's invitation to revisit *Reading* solely because its possible interpretation of the saving clause is incorrect, especially since our statement in *Reading* is not necessarily inconsistent with *Cooper Industries* in the first place.

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21. The other incentive is the contribution protection for settling PRPs provided under § 113(f)(2).

2. *Statutory Purpose*

DuPont's argument regarding the purpose of CERCLA merits more discussion. To repeat, DuPont contends that, in the wake of *Cooper Industries*, our decisions in *New Castle County* and *Reading* are in direct opposition to CERCLA's broad remedial purpose as expressed in its legislative history. This, it urges, makes necessary an implied cause of action for contribution, available to PRPs that voluntarily clean up contaminated sites, to fill the gaps *Cooper Industries* recognized in Congress' remedial scheme. Indeed, as one Court has noted, the "combined result" of *Cooper Industries* and cases like *New Castle County* and *Reading* is "quixotic": "the present statutory arrangement resulting from the combined authority of [Cooper Industries and earlier Courts of Appeals cases] compels a responsible party engaged in voluntary remediation to foot the bill for other parties, which will have the effect of encouraging responsible parties to rest on their heels and wait for the instigation of adverse proceedings, rather than implement a cost-effective environmental contamination response strategy." *Mercury Mall Assocs., Inc. v. Nick's Market, Inc.*, 368 F.Supp.2d 513, 519 (E.D.Va.2005) (internal quotation marks and alterations omitted).

As *amici* American Chemistry Council and Superfund Settlements Project assert, allowing only sued or settling PRPs to seek contribution "would discourage and delay the very cleanups that Congress sought to encourage and accelerate" by enacting CERCLA. *Amici* Br. at 9. Indeed, *amici* assert that the EPA has long encouraged PRPs to clean up contaminated sites voluntarily, and for those who do

(*amici* estimate around 70% of all cleanups), the EPA has stated that it is " 'important to . . . remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination.' " *Id.* at 7-8 (quoting National Oil and Hazardous Substance Contingency Plan, 55 Fed.Reg. 8666, 8792-93 (March 8, 1990)).[22] If PRPs engaged in voluntary cleanups may not seek contribution, DuPont and *amici* argue, "companies would resist undertaking new cleanup obligations, and would rarely do so voluntarily," thus frustrating core purposes of CERCLA. *Id.* at 9.

a. CERCLA's Legislative History

We begin, then, with the legislative history of CERCLA.[23] Although the statute is supposed to be

22. As we explain in footnote 30 below, however, this statement is taken out of context. In context, it is clear the EPA refers to cost recovery actions-which, as we noted in *New Castle County*, are available only to innocent parties, not PRPs.

23. We are mindful, of course, that legislative history can sometimes be "murky, ambiguous, and contradictory," and that recourse to it as an interpretive aid may, if we are not careful, devolve to "an exercise in looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 125 S.Ct. 2611, 2626, 162 L.Ed.2d 502 (2005) (internal quotation marks omitted). We are confident that these concerns are not implicated here. Though (as explained below) the legislative history of CERCLA is rather unclear, particularly with respect to voluntary cleanups by PRPs, the legislative history of SARA uniformly indicates the intent of Congress to encourage settlement by, *inter alia*, authorizing an (Cont'd)

"comprehensive," the legislative history is not, as many of the pre-SARA cases that allowed an implied right of action under § 107 observed. *See, e.g., Walls,* 761 F.2d at 318 ("[T]he legislative history of CERCLA is vague, reflecting the compromise nature of the legislation eventually enacted."); *NCC,* 642 F.Supp. at 1263 (noting "the absence of significant legislative history" of CERCLA); *see also* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980,* 8 Colum. J. Envtl. L. 1, 2 (1982) ("In the instance of the 'Superfund' legislation, a hastily assembled bill and a fragmented legislative history add to the usual difficulty of discerning the full meaning of the law.").

Though without doubt CERCLA's drafters intended that the statute encourage responsible parties to clean up hazardous waste sites and bear the costs of doing so, *see Morton Int'l,* 343 F.3d at 676, Congress' position on voluntary cleanups is less clear. Reporting on the proposed Hazardous Waste Containment Act (the House of Representatives' version of CERCLA, *see* Grad, *supra,* at 4-5),[24] the House Committee on Interstate and Foreign

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express and limited contribution right. We also observe that, although we would of course have no need to look to the legislative history to discern the meaning of an unambiguous statutory provision, *see Cooper Indus.,* 543 U.S. at 167, 125 S.Ct. 577, we need to consult the legislative history where, as here, a party urges us to disregard precedent and *imply* a cause of action to effect the intent of Congress.

24. For a thorough review of the legislative debates on the House and Senate versions of CERCLA, and the compromises that allowed the legislation to become law, see Grad, *supra.*

Commerce noted that the bill would "establish a Federal cause of action in strict liability to enable the [EPA] administrator to pursue rapid recovery of the costs incurred for the costs of such [cleanup] actions undertaken by him from persons liable therefor and to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites." H.R. Rep. No. 96-1016(I), at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. Representative Florio, the floor manager of the legislation in the House, noted that "[t]he strong liability provisions that are in our bill . . . are very important, because we want to induce those who know where these sites are to remedy the sites themselves. If there is no liability provision, they will not have any incentive whatsoever to go forward on a voluntary basis and clean up those sites." 126 Cong. Rec. H9441 (daily ed. Sept. 23, 1980); *see also id.* at H9467 (statement of Rep. Florio) ("EPA is required not to act if the responsible party or parties will take appropriate action to clean[ ]up and contain these sites.").

These statements do not, however, establish that Congress necessarily intended that PRPs engaged in voluntary cleanups be able to seek contribution; they could just as easily reflect congressional recognition that a strong enforcement scheme holding wrongdoers liable would encourage PRPs to head off potentially ruinous litigation or punitive settlements and clean up their own mess.[25] Indeed,

25. Indeed, the companion legislation in the Senate focused more on deterrence than on encouraging voluntary cleanups. *See* S.Rep. No. 96-848, at 13, 15 (1980) (noting that the bill's intent was

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Congress provided no express right of contribution for any PRP that incurred response costs, whether voluntarily or not. Language providing an express cause of action for contribution among PRPs was rejected by Congress, *see NCC*, 642 F.Supp. at 1263, as was language providing for joint and several liability, *see, e.g.*, 126 Cong. Rec. S14, 964 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph) ("It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms has been deleted, and the liability of joint tort feasors will be determined under common or previous statutory law."); 126 Cong. Rec. H11,787 (daily ed. Dec. 3, 1980) (statement of Rep. Florio) (same).

While it is clear that CERCLA's drafters intended common law principles to govern liability, we have not found evidence in the legislative history that Congress contemplated this would extend a contribution right to PRPs engaged in entirely voluntary cleanups. In fact, the House and Senate floor managers' statements that liability would be governed by common law principles appear inconsistent with this possibility, since contribution among jointly and severally liable tortfeasors ordinarily follows a determination of liability to a common plaintiff who suffered an injury.

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that "those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions" on the basis of "strict, joint, and several liability" to create an "incentive for greater care focus[ed] on the initial generators of hazardous wastes").

See, e.g., Restatement (Second) of Torts §§ 875, 886A (1979); 2 Michael Dore, *Law of Toxic Torts* § 16.04 (1999) ("In general, contribution is available whenever a party is held liable to a plaintiff for injuries [for] which other parties were at least partially responsible."); *see also Northwest Airlines*, 451 U.S. at 86-88, 101 S.Ct. 1571 (noting that, in "most American jurisdictions, . . . a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability"). As then-Representative Gore explained to the House of Representatives in offering an amendment to the Hazardous Waste Containment Act,

> Joint and several liability ordinarily would mean that whenever a single, indivisible harm is sustained as a result of independent, separate, but concurring tortious acts by two or more actors, each can be held liable for the entire amount of damages incurred. . . . The plaintiff could collect the total sum of damages awarded from a single defendant and could avoid the agony of multiple suits against the defendants that would otherwise be necessary to achieve full compensation.
>
> Under the theory of contribution, the defendant from whom the plaintiff receives payment may then collect from the other defendants for that part of the damages for which each is responsible. . . . [C]ourts [have] concluded that because the defendants were the ones at fault, it would be unfair to place the burden of

> demonstrating the apportionability of the damage on the plaintiff. The burden was thus placed on the defendants to work out for themselves who was responsible for what part of the injury under the process of contribution [after the plaintiff recovered his damages].

126 Cong. Rec. H9463 (daily ed. Sept. 23, 1980).

b. SARA's Legislative History

The legislative history of the SARA amendments, while labyrinthine, is less clouded than the legislative history of CERCLA as initially enacted, particularly with respect to contribution and voluntary cleanups. *Cooper Industries* puts beyond question that § 113 establishes a contribution remedy only for PRPs that have settled their liability or have been sued, and the legislative history supports this reading. *See, e.g.*, S.Rep. No. 99-11, at 44 (1985) (stating that § 113 "clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties"); H.R.Rep. No. 99-253(I), at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 (same); H.R.Rep. No. 99-253(III), at 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3041 (stating that § 113 "clarifies and emphasizes that persons who settle with EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties").

SARA's legislative history also reveals an express bent toward encouraging settlement. *See, e.g.*, H.R.Rep. No. 99-

253(III), at 29, *reprinted in* 1986 U.S.C.C.A.N., at 3052 ("The Judiciary Committee strongly agrees with the Energy and Commerce Committee that encouraging . . . negotiated cleanups will accelerate the rate of clean-ups and reduce their expense by making maximum use of private sector resources. The Committee also agrees that this emphasis on negotiated clean-ups should not replace or diminish a strong and aggressive enforcement policy, but rather should complement such a policy."); H.R.Rep. No. 99-253(I), at 100-01, *reprinted in* 1986 U.S.C.C.A.N., at 2882-83 (same). As the Senate Environment and Public Works Committee reported, voluntary cleanups, though desirable, should be undertaken pursuant to a settlement with the EPA:

> Congress, the EPA, responsible parties, and other critics have suggested several means of speeding up and economizing on site cleanups. These include enlarging the Superfund, setting program deadlines, expanding the EPA program offices, empowering citizens to sue, and encouraging voluntary cleanup by industry. Although enlarging the Fund, providing more staff, and setting program deadlines would tend to accelerate the CERCLA effort, the Administrative Conference believes that a properly designed site cleanup negotiation process, through which responsible parties or third parties would agree to act directly to clean up sites, would also hasten cleanup while reducing its expense by tapping the technical and financial resources of the private sector. Involvement of the federal government and affected citizens in this

> process would ensure adequate protection of public health and the environment.
>
> . . .
>
> The final agreement should take the form of an administrative consent order under section 106 of CERCLA or a judicial consent decree.

S.Rep. No. 99-11, at 65, 67; *see also* H.R.Rep. No. 99-253(V), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3181 ("The Committee recognizes that Fund-financed cleanups, administrative action and litigation-even under a strong and vigorous enforcement program-will not be sufficient to accomplish CERCLA's goals. *Voluntary cleanups are essential to a successful program for cleanup of the Nation's hazardous substance pollution problem. [SARA's settlement provisions are] intended to encourage and establish procedures and protections pertaining to negotiated private party cleanup of hazardous substances where such cleanup is in the public interest.*" (emphasis added)); 132 Cong. Rec. H9609 (statement of Rep. Slattery) ("This legislation . . . encourages potentially responsible parties to come out of the woodwork and the courts, and settle on an environmentally acceptable cleanup plan.").

It is also apparent from the legislative history that Congress intended the contribution allowed by § 113 to be a crucial part of its scheme to encourage settlement and (by extension) private cleanups by PRPs within the bounds of the settlement agreements. The House Energy and Commerce

Committee, for example, reported that limiting contribution to parties who were sued or settled

> should encourage private party settlements and cleanups. Parties who settle for all or part of a cleanup or its costs, or who pay judgments as a result of litigation, can attempt to recover some portion of their expenses and obligations in contribution litigation from parties who were not sued in the enforcement action or who were not parties to the settlement. [Such] parties may be more willing to assume the financial responsibility for some or all of the cleanup [*i.e.*, through settlement] if they are assured that they can seek contribution from others.

H.R.Rep. No. 99-253(I), at 80, *reprinted in* 1986 U.S.C.C.A.N., at 2862; S.Rep. No. 99-11, at 44 (same).

> The settlement procedures now set forth are expected to be a significant inducement for parties to come forth, to settle, to avoid wasteful litigation and thus to begin cleanup.
>
> . . .
>
> The bill would give potentially responsible parties the explicit right to sue other liable or potentially liable parties who also may be responsible for the hazardous waste site. [Also,] [i]f a party has resolved its liability to the U.S. or a state in a judicially[ ] approved, good-faith

> settlement, the party would not be liable for claims for contribution or indemnity on matters addressed in the settlement. *These provisions should encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups.*

H.R.Rep. No. 99-253(I), at 58-59, *reprinted in* 1986 U.S.C.C.A.N., at 2840-41 (emphasis added); *see also* H.R.Rep. No. 99-253(III), at 20, *reprinted in* 1986 U.S.C.C.A.N., at 3043 (explaining that "[the] amendments to the contribution section [*i.e.*, § 113] will improve its effectiveness, ensure its fair operation, and encourage settlements by responsible parties"). As Senator Stafford, the floor manager of SARA in the Senate, explained, the legislation recognized that settlements are a crucial part of the EPA's enforcement regime, and "[t]he theory underlying Superfund's liability scheme was, and is, that the Government should obtain the full costs of cleanup from those it targets for enforcement, and leave remaining costs to be recovered in private contribution actions between settling and nonsettling parties." 132 Cong. Rec. S14,903 (daily ed. Oct. 3, 1986).

* * * * *

Congress no doubt intended by the SARA amendments to encourage settlements, and further intended that the promise of contribution for settling wrongdoers would encourage them to come forward, negotiate a settlement with the Government, and begin work on supervised cleanups. Indeed, the "voluntary" nature of the cleanups Congress had in mind was a voluntary agreement to settle and enter into a

consent decree, rather than a wholly voluntary, unsupervised, *sua sponte* cleanup operation. CERCLA's initial legislative history-which is sparse, vague with respect to voluntary cleanups, and leaves issues of joint and several liability (including contribution) to the common law—must, of necessity, be read in tandem with SARA, and SARA establishes a specific and intricate legislative scheme for encouraging settlement through, among other things, a limited contribution right.

c. Contribution for Voluntary Cleanups without Settlement or Suit

To be sure, the legislative history of SARA contains no express statement that parties that clean up their own sites voluntarily, without having settled their liability or having been sued, cannot seek contribution.[26] We conclude, however, that SARA's settlement scheme is inconsistent with such a right.

First, we are mindful of the Supreme Court's caution that "once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law." *Northwest Airlines,* 451 U.S. at 95 n. 34, 101 S.Ct. 1571. The Court continued:

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26. Of course, as noted, there is no express statement in CERCLA or SARA, or in their respective legislative histories, that PRPs engaged in voluntary cleanups *can* seek contribution.

> In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt. *The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. . . . The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.*

Id. at 97, 101 S.Ct. 1571 (citation and footnote omitted) (emphasis added). We echoed this understanding in *Reading*. *See* 115 F.3d at 1117 ("[W]hen Congress expressly created a statutory right of contribution in CERCLA § 113(f), 42 U.S.C. § 9613(f), it made that remedy a part of an elaborate settlement scheme aimed at the efficient resolution of environmental disputes. Permitting independent common law remedies would create a path around the statutory settlement scheme, raising an obstacle to the intent of Congress.").[27]

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27. DuPont counters with another rule of statutory construction: "that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986). It argues that Congress should not be deemed to have rejected a common law implied right

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Indeed, it would be odd to suppose that Congress would have expressly provided a contribution right for PRPs that settled or were sued as part of an elaborate statutory scheme to encourage settlement if it intended that all other PRPs would be able to obtain contribution under some implied or common law right.

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of contribution without expressly saying so. In *Reading*, however, we concluded that Congress *did* specifically replace all common law remedies with an express and exclusive statutory remedy, and with good reason: allowing PRPs to seek contribution only within the confines of § 113 provides a powerful incentive for them to settle their liability, a prime goal of SARA.

Indeed, the legislative history of SARA reveals that Congress approved expressly of certain prior cases, and none of them involved a PRP that voluntarily cleaned up its site without having settled or been sued. The House Energy and Commerce Committee reported that it agreed with *United States v. S.C. Recycling & Disposal, Inc.*, 653 F.Supp. 984 (D.S.C.1986) (which held PRPs jointly and severally liable to the United States and suggested, in keeping with ordinary contribution rules, that upon being held liable a PRP could seek contribution from other PRPs), and *United States v. Ward*, No. 83-63-CIV-5, 1984 WL 15710 (E.D.N.C. May 14, 1984) (which held that a PRP deemed jointly and severally liable can seek contribution from other PRPs under the common law), and explained that § 113 "clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." H.R.Rep. No. 99-253(I), at 79, *reprinted in* 1986 U.S.C.C.A.N., at 2861 (emphasis added); *see also id.* at 74, *reprinted in* 1986 U.S.C.C.A.N., at 2856 (noting that the Committee "fully subscribes to the reasoning" in *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D.Ohio 1983), that PRPs are jointly and severally liable to third parties).

It might be argued, however, that CERCLA's general purpose (*i.e.*, prompt and effective cleanup) is accomplished by any sort of cleanup (whether pursuant to a settlement, in response to a suit, or voluntarily). Under this view, SARA's preference for settlement and its express provision of contribution as an incentive to seek settlement should not be deemed to preclude reconsideration of precedents that, in light of *Cooper Industries*, now serve as a barrier to certain cleanups that would otherwise satisfy the desire for prompt and effective action.

We disagree with this argument. Of particular concern to the Congress that enacted SARA was setting standards likely to effect the safe and effective cleanup of contaminated sites in a manner beneficial to the public interest. *See, e.g.*, CERCLA § 121, 42 U.S.C. § 9621 (requiring "[t]he President [to] select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable," and setting standards for meeting this requirement); *Ohio v. EPA*, 997 F.2d 1520, 1526 (D.C.Cir.1993) (noting that "the statute . . . require[s] that remedial actions at Superfund sites result in a level of cleanup or standard of control that at least meets the legally applicable or otherwise relevant and appropriate federal (or stricter state) requirements," particularly the "legally 'applicable' or 'relevant and appropriate' environmental standards" in the National Contingency Plan ("NCP")). The House Committee on Public Works and Transportation explained that the EPA must consider, *inter alia*, "the availability of technology, the installation period, the uncertainties related to the level of

performance or the solution or remedial action, the level of public support for the solution or remedial action, and whether or not the solution or remedial action has been achieved in practice at any other facility or site which has characteristics similar to the facility or site concerned." H.R.Rep. No. 99-253(V), at 50, *reprinted in* 1986 U.S.C.C.A.N., at 3173.[28]

Indeed, before SARA was enacted, the EPA expressed serious doubts about *sua sponte* voluntary cleanups by PRPs. In the 1983 amendment to the NCP that added the National Priorities List for site cleanup, the EPA explained that, by designating certain sites as subject to "Voluntary or Negotiated Response," its strong preference was for negotiated cleanups with Government oversight.[29]

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28. In fact, under CERCLA § 122(e)(6), 42 U.S.C. § 9622(e)(6), Congress expressly forbade, without the EPA's approval, remedial actions by PRPs once an administrative order or consent decree was in place. As Senator Mitchell explained, "[t]his [provision] is to avoid situations in which the PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem." 132 Cong. Rec. S14919 (daily ed. Oct. 3, 1986).

29. This does not, of course, mean that only *federal* Government oversight is allowed. *See United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1418 (6th Cir.1991) ("The federal legislative scheme and its history are persuasive that Congress did not intend to leave the cleanup under CERCLA solely in the hands of the federal government. CERCLA, as amended by SARA, provides a substantial and meaningful role for the individual states in the selection and development of remedial actions to be taken within their jurisdictions.").

Sites are included in this category if private parties are taking response actions pursuant to a consent order or agreement to which EPA is a party. Voluntary or negotiated cleanup may include actions taken pursuant to consent orders reached after EPA has commenced an enforcement action. This category of response may include remedial investigations, feasibility studies, and other preliminary work, as well as actual cleanup.

Several commenters were concerned that this category did not adequately reflect voluntary response efforts undertaken without formal agreements with EPA. *However, EPA studies have shown that many of the response actions undertaken by private parties outside the sanction of EPA consent agreements have not been successful. Furthermore, some private parties have represented routine maintenance or waste management activities as response actions, thereby leading to the conclusion that only after a thorough technical review can the Agency describe actions by private parties as "responses". Thus, EPA believes that to describe actions taken outside consent orders as "response" would in many instances be misleading to the public[,] as EPA cannot assure the public that the actions are appropriate, adequate, consistent with the NCP, and are being fully implemented.* Therefore, the Agency encourages any responsible parties who are undertaking voluntary response actions at NPL

sites to contact the Agency to negotiate consent agreements.

This is not intended to preclude responsible parties from taking voluntary response actions outside of a consent agreement. However, in order for the site to be deleted or to be noted in the voluntary or negotiated response category, EPA must still sanction the completed cleanup. If the remedial action is not fully implemented or is not consistent with the NCP, the responsible party may be subject to an enforcement action. Therefore, most responsible parties may find it in their best interest to negotiate a consent agreement.

Amendment to National Oil and Hazardous Substance Contingency Plan, 48 Fed.Reg. 40,661 (Sept. 8, 1983) (emphasis added).[30]

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30. Although the EPA treats innocent parties more generously than wrongdoing PRPs, it expressed a similar concern with respect to cost recovery by innocent parties in the substantive amendment to the NCP implementing SARA:

> EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination. At the same time, EPA believes it is important to establish a standard against which to measure cleanups that qualify for cost recovery under CERCLA, so that only CERCLA-quality cleanups are encouraged. . . . [Thus,] in evaluating whether or not a

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There is, of course, no explicit indication in SARA or the legislative history that Congress was motivated by these concerns in amending CERCLA to encourage settlement. But the import of Congress' scheme (an express desire to oversee cleanups via settlements and other enforcement actions, the explicit promise of contribution as an incentive for PRPs to enter negotiated cleanup agreements, and the desire for quality—control standards for safe, effective, and reliable cleanups) is consistent with the EPA's wariness of wholly voluntary and unregulated cleanups. As the attorneys who prevailed in *Cooper Industries* argue in a recent article,

> [a]ny suggestion that section 107(a) offers some other federal recourse to PRPs seeking a

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> private party should be entitled to cost recovery under CERCLA section 107(a)(4)(B), EPA believes that "consistency with the NCP" should be measured by whether the private party cleanup has, when evaluated as a whole, achieved "substantial compliance" with potentially applicable requirements, and resulted in a CERCLA-quality cleanup.
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> . . .
>
> [T]he government has a strong interest in ensuring that cleanup actions that derive a benefit from CERCLA section 107(a)(4)(B)—a statute under the charge of EPA-are performed in an environmentally sound manner; thus, it is appropriate to provide a standard or measure of consistency with the NCP.

National Oil and Hazardous Substance Contingency Plan, 55 Fed.Reg. 8666, 8792-93, 8794 (March 8, 1990).

> contribution remedy under CERCLA is . . . undermined by the settlement scheme that Congress devised with its enactment of section 113's contribution provision. Specifically, under the SARA amendments, those who settle their cleanup claims with federal or state authorities receive an explicit right of contribution against other PRPs under section 113(f)(3)(B), as well as statutory protection under section 113(f)(2) from possible future contribution actions by other responsible parties.
>
> Protecting the integrity of this legislative scheme to incentivize settlements was a key factor for the federal circuit courts in universally determining that parties responsible for the site contamination may not assert section 107(a) actions seeking to recover their cleanup costs from other responsible parties, but must instead ··· seek contribution under section 113(f)(1).

William Bradford Reynolds & Lisa K. Hsiao, *The Right of Contribution Under CERCLA After Cooper Industries v. Aviall Services*, 18 Tul. Envtl. L.J. 339, 349-50 (2005) (footnotes omitted) (citing, *inter alia, Reading*, 115 F.3d at 1119); *see also id.* at 353 (contending that CERCLA's purpose was never to "encourag[e] wholly unsupervised private remediation activities," but rather to "facilitat[e] government-sponsored cleanups").

To be sure, other courts have concluded that because CERCLA's general goal was to assure prompt and effective

cleanups, and *sua sponte* cleanups by PRPs may be prompt and effective, those PRPs must be able to seek contribution. *See, e.g., Atlantic Research Corp. v. United States*, 459 F.3d 827, 835-37 (8th Cir.2006); *Consol. Edison*, 423 F.3d at 99-100; *City of Bangor v. Citizens Commc'ns Co.*, 437 F.Supp.2d 180, 222-23 (D.Me.2006) (citing *Consol. Edison*, 423 F.3d at 100); *Viacom, Inc. v. United States*, 404 F.Supp.2d 3, 8 (D.D.C.2005). We believe, however, that a thorough review of CERCLA, as amended by SARA, does not support this conclusion. Congress intended to allow contribution for settling or sued PRPs as a way to encourage them to admit their liability, settle with the Government, and begin expeditious cleanup operations pursuant to a consent decree or other agreement. Our precedents recognize this "elaborate settlement scheme," *see Reading*, 115 F.3d at 1117, and if we were to revisit them now, we would risk upsetting Congress' carefully chosen remedy.[31] In any event, the

31. DuPont makes the interesting argument that Congress' scheme effectively allows the federal Government to avoid liability in contribution for its actions as a PRP. It contends that the EPA is generally prohibited from pursuing CERCLA actions against other federal agencies, and thus "the government's liability under CERCLA will almost invariably be in contribution." Appellants' Br. at 41-42 (citing Exec. Order No. 12,580, 52 Fed.Reg. 2923 (Jan. 23, 1987)). If private PRPs may only seek contribution from the United States (as a PRP) if there is a preexisting action under § 106 or § 107 or settlement under § 113(f)(3)(B), DuPont argues, the Government could use its "many options for exercising its enforcement discretion to avoid governmental liability under CERCLA." *Id.* at 42. As noted in footnote 18 above, the Eighth Circuit accepted this argument recently in *Atlantic Research*, 459 F.3d at 836-37.

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legislative history of CERCLA, when read in conjunction with that of SARA, simply does not show that our precedents are at odds with Congress' intent.[32]

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DuPont does not, however, provide evidence that the EPA actually uses its enforcement discretion to avoid subjecting other federal agencies to potential liability in a later contribution suit (nor did the Eighth Circuit cite such evidence in its decision). Indeed, it would in many cases be difficult for the EPA to do so because, under principles of joint and several liability, the initial suit or settlement does not involve other tortfeasors, who are identified and deemed liable in later proceedings. Also, the federal Government has little or no control over suits by innocent landowners or state enforcement actions, both of which would serve as a predicate for § 113(f)(1) contribution.

32. Nor do we have cause to reconsider *New Castle County's* holding that cost recovery under § 107 is only available to innocent parties. In *Consolidated Edison*, the Second Circuit found "no basis for reading into [§ 107] a distinction between so-called 'innocent' parties and [PRPs]," and suggested in a footnote that the concern expressed in *New Castle County* (that it would be illogical to allow a PRP to recover all of its costs on the same basis as an entirely blameless party) was "misplaced," because "there appears to be no bar precluding a person sued under section 107(a) from bringing a counterclaim under section 113(f)(1) for offsetting contribution against the plaintiff volunteer who, if sued, would be liable under section 107(a)." 423 F.3d at 99-100 & n. 9. We make three observations.

First, the Second Circuit declined explicitly to consider "whether a three-judge panel of this court may depart from *Bedford Affiliates's* section 107(a) holding" because it deemed *Bedford Affiliates* factually distinguishable. *Consol. Edison*, 423 F.3d at 100-01

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d. Public Policy Arguments

Of course, it could be that encouraging *sua sponte* voluntary cleanups by capable PRPs is in the public's interest,

(Cont'd)
& n. 12. But it is hard to see how the later panel could simply assert there is "no basis" for limiting § 107 cost recovery suits to innocent parties when *Bedford Affiliates* (like our decision in *New Castle County*) plainly held the opposite. *See Bedford Affiliates*, 156 F.3d at 424 ("[O]ne potentially responsible person can never recover 100 percent of the response costs from others similarly situated since it is a joint tortfeasor-and not an innocent party-that ultimately must bear its *pro rata* share of cleanup costs under § 107(a). . . . Congress planned that an innocent party be able to sue for full recovery of its costs [under § 107] while a party that is itself liable may recover only those costs exceeding its *pro rata* share of the entire cleanup expenditure, *i.e.*, contribution under § 113(f)(1).").

Second, the Second Circuit's proposed procedure-allowing a PRP "volunteer" to obtain full cost recovery, but then subjecting it to a counterclaim by other PRPs for "offsetting contribution" to avoid unjust enrichment-seems quite unwieldy and is, in any event, not contemplated by CERCLA or SARA.

Third, and perhaps most importantly, although another Circuit's views are entitled to due weight by our Court, they are not "intervening authority" that would justify our reconsideration of our precedents without *en banc* review. Indeed, we note that at least one other Circuit Court has agreed with our interpretation of § 107(a) in a case decided after *Consolidated Edison*. *See Elementis Chromium L.P. v. Coastal States Petrol. Co., 450 F.3d 607, 613 (5th Cir.2006)* ("[W]hen one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107(a), and the imposition of joint and several liability is inappropriate." (internal quotation marks omitted) (alteration in original)).

and would be a better way to protect health and the environment than pressuring them into settlement agreements. This is not self—evident, however. As Judge Sand recently observed, limiting contribution rights to settling or sued PRPs

> would pressure PRPs to settle with some government regarding their own liability for polluting a site, if they wanted to obtain contribution from others also responsible for polluting that site. There is nothing necessarily irrational about requiring a PRP that voluntarily goes to court to obtain cost reimbursement [through contribution], as opposed to being dragged into court by another party, to either prove its 'innocence' . . . or officially admit its 'guilt' (via a settlement); such a forced choice would be entirely consistent with Congress's intent.

Elementis Chems., Inc. v. TH Agric. & Nutrition, L.L.C., 373 F.Supp.2d 257, 272 (S.D.N.Y.2005).

But we need not linger on this particular issue. The fact that DuPont and the other appellants, if they are allowed contribution for response costs voluntarily incurred, may be capable of reaching a good result without the Government oversight provided for in SARA, is not a reason to reconsider our prior holdings that the statute precludes such causes of action. And, in any event, the debate over whether our national environmental cleanup laws should favor prompt and effective cleanups in any manner (including *sua sponte* voluntary cleanups by PRPs), or should favor settlements

and other enforcement actions to ensure that wrongdoers admit their fault and fix the problem under the aegis of Government oversight, is a matter for Congress, not our Court. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) ("The policy questions presented by petitioner's claimed right to contribution are far-reaching. In declining to provide a right to contribution, we neither reject the validity of those arguments nor adopt the views of those opposing contribution. Rather, we recognize that, regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve."). Congress sets policy. We steer clear of such matters, as our function is to interpret the statutes Congress enacts to reflect its policy choices.

* * * * *

Having determined that *New Castle County* and *Reading* control this case, and that neither the Supreme Court's decision in *Cooper Industries* nor the purpose of CERCLA (as amended by SARA) provide cause to reexamine those precedents, we must refuse DuPont's invitation to imply a cause of action for contribution under § 107 or the common law available to PRPs engaged in *sua sponte* voluntary cleanups. We are aware, of course, that other courts have held differently, but we do not believe those decisions can be reconciled with SARA.

V. Judgment on the Pleadings

Because appellants cannot seek contribution for their voluntary cleanup efforts (and, hence, the District Court's

December 30, 2003 order, as amended on January 8, 2004, must be affirmed), we proceed to consider whether the District Court erred in granting the Government judgment on the pleadings with respect to the remaining fourteen sites at issue in this litigation. Our review of judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) is "confined to the allegations in the pleadings," and we "must accept [the nonmovant's] version of events as true." *Consol. Rail Corp. v. Portlight, Inc.*, 188 F.3d 93, 98 (3d Cir.1999). The motion should be granted if "there is no material issue of fact to resolve," *Mele v. Fed. Res. Bank of N.Y.*, 359 F.3d 251, 253 (3d Cir.2004) (internal quotation marks omitted), and neither we nor the District Court may "consider matters extraneous to the pleadings" in deciding whether there are material facts in dispute. *Id.* at 256 n. 5 (internal quotation marks omitted).

The District Court concluded that, although appellants asserted they could introduce evidence that some of the other sites were being cleaned up pursuant to EPA consent decrees (and thus might qualify for § 113(f)(1) contribution), they never did introduce that evidence, nor did they seek to amend their complaint. Thus, based solely on the pleadings, the District Court granted judgment to the Government because appellants' complaint did not allege any facts that would suggest the circumstances of the cleanups at other sites were different from those at DuPont's Louisville facility. DuPont argues that, since discovery had not yet proceeded with respect to any of the other sites, it was premature to conclude that the circumstances at those sites were the same as in Louisville. This is not, however, what the District Court concluded. Rather, it rightly noted that appellants bore the burden of pleading facts sufficient to show they could obtain

§ 113 contribution. Surely they did not need discovery to determine whether cleanups at some of their sites were pursuant to a suit, settlement, or consent decree.

A straightforward reading of appellants' complaint reveals no allegation that any site was cleaned up pursuant to some kind of suit or settlement. The complaint merely describes the Government's alleged actions that contributed to contamination at each site, without any reference to the current cleanup operations. The only discussion of the cleanup operations reveals that appellants "have undertaken, and are undertaking, response actions with respect to the Facilities in response to releases or threatened releases of hazardous substances, and have incurred and are incurring necessary costs of response consistent with the NCP." Thus, based solely on the pleadings, appellants have not set out facts sufficient to demonstrate, even by inference, that they could possibly prevail on their claim for contribution under § 113.[33]

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33. After this appeal was filed, the Government learned that in 2001 the EPA sued DuPont under § 107(a) regarding contamination at the Necco Park facility in Niagara, New York. *See* Gov't Br. at 57 n. 25. Thus, the Government recommends that any dismissal of DuPont's claim with respect to that site be without prejudice. Since the EPA brought suit in 2001 (two-and-a-half years before the District Court issued its final judgment in this case), we are reluctant to allow DuPont a second bite at this apple for the same reasons we believe its claims with respect to the other facilities were properly dismissed. The Government nonetheless is willing to subject itself to a suit for contribution regarding the Necco Park facility. In this context, and even though DuPont (surprisingly) did not bring the suit to the District Court's attention, we abide the Government's request. Insofar as the Necco Park facility is concerned, the District Court's March 1, 2004 order is converted to a dismissal without prejudice.

VI. Conclusion

We are not, of course, unsympathetic to the policy arguments made by appellants. Nothing in our decision, however, forces them to sit on contaminated sites and wait to be sued, endangering public health all the while. They can, consistent with SARA, approach the EPA or a state environmental agency and settle their liability, and then seek contribution from others. If indeed they desire to be good corporate citizens (which their *sua sponte* voluntary cleanups suggest is the case), we have little doubt they will seek settlement rather than wait to be sued. They are not, of course, guaranteed terms in a settlement as favorable as those they would enjoy if they cleaned up a contaminated site entirely on their own, but this is an inescapable consequence of Congress' plan. That plan, recognized and protected in our precedents, was left untouched (and arguably strengthened) by *Cooper Industries,* and we therefore have no cause to reconsider our precedents here.

For these reasons, the District Court's December 30, 2003 order (as amended on January 8, 2004) is affirmed. Its March 1, 2004 order is also affirmed, with the caveat that the District Court's dismissal of the contribution claim regarding DuPont's Necco Park facility in Niagara, New York is converted to a dismissal without prejudice.

Appendix A

SLOVITER, *Circuit Judge, dissenting.*

Judge Ambro has written a fine opinion in support of the majority's position that plaintiff DuPont does not have a right to contribution from the United States for its voluntary cleanup of a site that was polluted by the United States as well as by DuPont. I reach a conclusion different from that reached by the majority and write so that this view can be considered along with that of the majority. Because Judge Ambro's opinion fully sets forth the legal background, I make every effort to avoid repetition.

The majority concludes that DuPont cannot maintain this action against the United States for contribution for cleanup costs under CERCLA § 107 because of our decisions in *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir.1997), and *In re Reading Co.*, 115 F.3d 1111 (3d Cir.1997). Although this court adheres strictly to our precedents, we have made clear that those precedents may be reevaluated when there has been intervening authority. *See George Harms Constr. Co. v. Chao*, 371 F.3d 156, 161 (3d Cir.2004) ("We recognize that we may reevaluate a precedent in light of intervening authority even without en banc consideration."); *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 858 (3d Cir.1996) ("Although a panel of this court is bound by, and lacks authority to overrule, a published decision of a prior panel . . . , a panel may reevaluate a precedent in light of intervening authority[.]").

Such reevaluation of precedent is appropriate here even though, as the majority correctly notes, we must be particularly cautious in revisiting cases involving questions

of statutory interpretation. Indeed, the Supreme Court has noted that in certain circumstances courts may appropriately overrule statutory precedents. It has explained that in "cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision." *Patterson v. McLean Credit Union,* 491 U.S. 164, 173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (citations omitted).

The Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004), is such intervening authority. It should impel us to reevaluate our precedent because *Cooper Industries* weakens the conceptual underpinnings of our decisions in *Reading* and *New Castle County*. For that reason, and because our holdings in *Reading* and *New Castle County* cannot be reconciled with the policies Congress sought to encourage when it enacted CERCLA, I believe this court can and should reconsider those opinions.

There is nothing in the relevant language of § 107 that compels the result the majority reaches. Section 107 states that various parties, including the owner or operator of a facility, may be responsible for "any . . . necessary costs of response incurred by any other person consistent with the national contingency plan," § 107(a)(4)(B), and provides a

cause of action to parties that incur cleanup costs but have not themselves been sued under § 106 or § 107.[34] For years after the 1980 enactment of CERCLA, district courts almost unanimously found that § 107 contained an implied cause of action for contribution. *See, e.g., United States v. New Castle County, 642 F.Supp. 1258, 1265-69 (D.Del.1986)* (holding that contribution right arises under federal common law); *Colorado v. ASARCO, Inc.*, 608 F.Supp. 1484, 1489-91 (D.Colo.1985) (same); *Wehner v. Syntex Agribusiness, Inc.*, 616 F.Supp. 27, 31 (E.D.Mo.1985) (holding that contribution right is implied from language of § 107(e)(2)). With the enactment of § 113, the courts turned to that section rather than to § 107 to provide the cause of action.

In *New Castle County*, this court stated that § 113 provided a "potentially responsible person[ ] with the appropriate vehicle" to "recoup that portion of its expenditures which exceeds its fair share of the overall liability." 111 F.3d at 1122. We further held that "a section

34. In *New Castle County*, we stated only that innocent parties may bring suit under § 107. Our imposition of the "innocent" standard on parties seeking to bring suit under § 107 is not based on the statutory text. Arguably, the "innocent" standard imposed by this and other circuits violates fundamental rules of statutory construction by imposing a requirement not evident on the statute's face. This court-created standard ignores the fact that § 107(a)(4)(B) plainly allows a private party plaintiff to be "any other person" besides the government, state, and Indian tribes and does not expressly exclude parties that may be responsible for a spill. Moreover, courts that adopt this standard narrowly interpret § 107 and ignore that CERCLA is a remedial statute, which courts are to construe liberally in order to achieve its intended purposes-namely the prompt cleanup of hazardous sites.

107 action brought for recovery of costs may be brought only by *innocent* parties that have undertaken clean-ups." *Id. at 1120.* Similarly, in *Reading,* we held that a potentially responsible party may not seek contribution under § 107(a)(4)(B). In fact, we stated " § 113(f)(1) specifically permits an action for contribution to be brought in the absence of civil action under section 107." 115 F.3d at 1120 (internal punctuation and quotation marks omitted).

The trend toward application of § 113 was halted by the Supreme Court's decision in *Cooper Industries,* where the Court held that the plain language of § 113(f)(1) does not allow liable parties to bring contribution actions unless and until a related civil action is brought against them under either § 106 or § 107. The Court reserved judgment on the question whether liable parties who are not subject to an action under § 106 or § 107 may instead seek relief under § 107(a)(4)(B).

Cooper Industries clearly undermined our opinions in *Reading* and *New Castle County.* In those cases, we assumed that all potentially responsible parties-those whose responsibility had been adjudicated and those who voluntarily admitted their responsibility-fell into the same category of "potentially responsible parties" who could recoup losses by bringing suit pursuant to § 113(f). The Supreme Court's decision in *Cooper Industries* established that our understanding of the category "potentially responsible parties" was incorrect. *Cooper Industries* holds that a party who has in fact been held responsible (via adjudication or settlement with the EPA) may bring an action under § 113(f), while a party who admits responsibility but whose responsibility has not been established may not. *Cooper*

Industries highlights the fact that the term "potentially responsible party" is "vague and imprecise because, when no action has been filed nor fact-finding conducted, *any* person is *conceivably* a responsible party under CERCLA." *Consolidated Edison Co. of New York v. UGI Utilities, Inc.*, 423 F.3d 90, 97 n. 8 (2d Cir.2005), *petition for cert. filed*, 74 U.S.L.W. 3600 (U.S. Apr. 14, 2006) (No. 05-1323).[35]

In addition, *Reading* and *New Castle County* are clearly factually distinguishable from the situation before us. In *New Castle County*, plaintiffs already had been sued by the Government and then brought an action against other potentially responsible parties to recover response costs under § 107(a)(4)(B). This court held that plaintiffs could not assert a cause of action under § 107 and restricted them to making a claim for contribution under § 113(f). *See* 111 F.3d at 1116. Similarly, in *Reading*, the plaintiff had already been sued under § 107. *See* 115 F.3d at 1116. In the instant case, DuPont has not been ordered to undertake remedial action. Rather, it voluntarily cleaned up numerous hazardous sights. Any

35. The majority holds that our erroneous observation in *Reading* that " § 113(f)(1) specifically permits an action for contribution to be brought 'in the absence of a civil action under . . . section [107],' " 115 F.3d at 1120, does not fatally undermine *Reading's* holding. I respectfully disagree. *Cooper Industries* clearly establishes that § 113(f) did not, as we stated, "replace[ ] the judicially created cause of action under § 107(a)(4)(B) to the extent that a party seeks contribution." *Reading, 115 F.3d at 1120.* That judicially created cause of action was available to parties that had not been sued under § 106 or § 107. Our broad reading of § 113(f) in *Reading* is fundamentally at odds with the Supreme Court's understanding of § 113(f) in *Cooper Industries*.

statements this court made regarding the ability of parties against whom § 106 or § 107 actions had not been brought to sue under § 107 or § 113 were not necessary to answer the questions presented by those cases and need not govern our analysis in this case.

Two of our sister circuits have recently considered the same issue presented here and both have decided, contrary to the majority, that section 107(a) can be used by a responsible party to seek contribution from another responsible party. In *Consolidated Edison*, the Court of Appeals for the Second Circuit unanimously held,

> We believe . . . that Con Ed may pursue its suit under section 107(a) because, in light of *Cooper Industries*, Con Ed's costs to clean up the sites of the Westchester Plants are "costs of response" within the meaning of that section.

423 F.3d at 97.

The Second Circuit, like this court, had held, before the *Cooper Industries* decision, that CERCLA section 113(f) governs contribution actions and that the plaintiff could not pursue a section 107(a) cost recovery claim against the defendants. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir.1998). The Supreme Court's decision in *Cooper Industries* convinced the Second Circuit to change its view. As the court explained in *Consolidated Edison*:

> [The *Cooper Industries*] decision impels us to conclude that it no longer makes sense to view

> section 113(f)(1) as the means by which section 107(a) cost recovery remedy is effected by parties that would themselves be liable if sued under section 107(a).

423 F.3d at 99. The court further stated that it "would be impermissibly discouraging voluntary cleanup were we to read section 107(a) to preclude parties that, if sued, would be held liable under section 107(a) from recovering necessary response costs." *Id.* at 100.

The court thus concluded, "that section 107 permits a party that has not been sued or made to participate in an administrative proceeding, but that if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily, not under a court or administrative order or judgment." *Id.*

Just this ~~month, the~~ Court of Appeals for the Eighth Circuit, again unanimously, reached a similar conclusion. In *Atlantic Research Corp. v. United States,* the court held that: "[A] private party which voluntarily undertakes a cleanup for which it may be held liable, thus barring it from contribution under CERCLA's § 113, may pursue an action for direct recovery or contribution under § 107, against another liable party." 459 F.3d 827, 837 (8th Cir.2006).

Atlantic Research, the plaintiff in the Eighth Circuit decision, was in a position almost identical to that of DuPont here ~~in that it~~ sought to recover contribution for cleanup from the United States for cleanup services it performed at a facility where it retrofitted rocket monitors for the United States.

The court, like the Second Circuit in *Bedford Affiliates,* had held in *Dico Inc. v. Amoco Oil Co.*, 340 F.3d 525, 531 (8th Cir.2003), that a liable party could not bring an action under section 107. The Eighth Circuit, like the Second Circuit, reconsidered that earlier holding in light of the decision in *Cooper Industries* and did an about face. I believe that this court's earlier decisions in *New Castle County* and *In re Reading Co.* are similarly superseded by the decision in *Cooper Industries.*

Both the Second and the Eighth Circuits's decisions cited the Supreme Court's decision in *Key Tronic Corp. v. United States,* 511 U.S. 809, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994). In that case, which concerned attorney's fees under CERCLA, the Supreme Court recognized that a potentially responsible party could seek recovery of response costs under § 107, but the Justices differed as to whether there was an express or implied cause of action. Justice Ginsburg, in her dissent in *Cooper Industries,* stated that every Member of the Court in *Key Tronic* agreed that a potentially responsible party which incurred necessary costs could recover those costs from another liable party in an action under § 107(a). *Cooper Industries,* 543 U.S. at 172, 125 S.Ct. 577. Significantly, the plaintiff in *Key Tronic* was a party responsible for polluting and was still permitted to bring suit under § 107. As the Court of Appeals for the Second Circuit recently stated, *Cooper Industries* and the text of § 107 clearly "impel[ ] us to conclude that it no longer makes sense to view section 113(f)(1) as the means by which the section 107(a) cost recovery remedy is effected by parties that would themselves be liable if sued under section 107(a)." *Consolidated Edison,* 423 F.3d at 99. Rather, § 107(a) and § 113(f)(1) embody

mechanisms for cost recovery available to persons in different procedural postures. *Id.*

Contrary to the majority, I believe that permitting parties who voluntarily incur cleanup costs to bring suit under § 107 comports with the fundamental purposes of CERCLA. As this court noted in *Horsehead Industries, Inc. v. Paramount Communications, Inc.*, 258 F.3d 132 (3d Cir.2001):

> The purpose of CERCLA is "to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities."

Id. at 135 (quoting 42 U.S.C. § 9607(k)(6)(E)); *see OHM Remediation Services v. Evans Cooperage Co.*, 116 F.3d 1574 (5th Cir.1997) (noting CERCLA's broad, remedial purpose to facilitate prompt cleanup of hazardous waste sites and to shift costs of environmental response from taxpayers to parties who benefitted from wastes that caused harm); *see also In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 206 (3d Cir.2003) (stating that CERCLA's purpose is "making those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created") (citation and quotation marks omitted).

Voluntary cleanups are vital to fulfilling CERCLA's purpose. During deliberations on the SARA Amendments,

Congress emphasized the importance of voluntary action, stating that "[v]oluntary cleanups are essential to a successful program for clean up of the Nation's hazardous substance pollution problem." H.R.Rep. No. 99-253, pt. 5, at 58 (1985), U.S.Code Cong. & Admin.News 1986 pp. 3124, 3181; *see also* 131 Cong. Rec. 24725, 24730 (1985) (statement of Sen. Domenici) ("The goal of CERCLA is to achieve effective and expedited cleanup of as many uncontrolled hazardous waste facilities as possible. One important component of the realistic strategy must be the encouragement of voluntary cleanup actions or funding without having the President relying on the panoply of administrative and judicial tools available.").

The majority reads the legislative history of SARA as strongly indicating that Congress did not mean to encourage unsupervised voluntary cleanups, but rather cleanups within the bounds of settlement agreements. *See* Maj. Op. at IV.B.2(b). The majority notes that the EPA expressed serious doubts about the efficacy of voluntary cleanups by parties.[36] *See* Maj. Op. at IV.B.2(c). These assertions, part of a long and fractious legislative history, are not dispositive. Though

36. The EPA's approach to voluntary cleanups has varied. The majority argues that the EPA was wary of such cleanups prior to the enactment of SARA. However, the EPA has also expressed concern that the position advocated by the United States and adopted by the Supreme Court in *Cooper Industries* could undermine EPA's voluntary cleanup program by removing an incentive for liable parties to voluntarily clean up contaminated sites because it would make it more difficult to seek reimbursements. *See Ruling on Superfund Costs May Boost Push for Supreme Court Review*, INSIDE THE EPA, Jan. 9, 2004, sec. 2, *available at* 2004 WLNR 70249.

supervised cleanups are to be encouraged wherever possible, they need not be encouraged at the expense of unsupervised cleanups. Section 107(a)(4)(B) holds a party liable for costs incurred in a cleanup (voluntary or otherwise) only insofar as those costs are "costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(B). A party that seeks contribution for costs incurred in a cleanup that does not comport with the national contingency plan is without recourse.[37]

The position urged by DuPont here is an alternative and equally effective, albeit voluntary, method of assuring cleanup in compliance with CERCLA. *See Kotrous v. Goss-Jewett Co. of N. Cal.*, No. Civ. S02-1520, 2005 WL 1417152, at *3 (E.D.Cal. June 16, 2005) (holding that a potentially responsible party may maintain a claim for contribution under § 107(a)); *Metro. Water Reclamation Dist. v. Lake River Corp.*, 365 F.Supp.2d 913, 918 (N.D.Ill.2005) (explaining that "although PRP's are not explicitly named in § 107(a), there seems to be no reason why they would be excluded from the provision that allows recovery for any person"); *Vine St. LLC v. Keeling*, 362 F.Supp.2d 754, 761-64 (D.Tex.2005) (holding that potentially responsible party could bring claim under § 107(a)); *cf. Atl. Research Corp. v. United States*, No. 02-CV-1199, 2005 U.S. Dist. LEXIS 20484, at *10 (W.D. Ark. June 1, 2005) (suggesting the Eighth Circuit revisit its precedents after noting "that the result . . . is patently unfair to ARC, because it has voluntarily

37. By the plain text of the statute, parties that fail to meet the national contingency plan standards cannot be reimbursed for such activities.

cleaned up environmental contamination, yet it is left without a CERCLA remedy against the United States, another PRP").

As the majority itself notes, SARA was "not intended to preclude responsible parties from taking voluntary response actions outside a consent agreement." Maj. Op. at IV.B.2(c). I am concerned that the effect of the majority's opinion will be that parties will be reluctant to engage in voluntary cleanups for fear that they may not be able to obtain contribution. Spills that could be most efficaciously dealt with if cleaned up immediately will remain untouched while parties attempt to settle with the Government. This result is contrary to the purpose of CERCLA. Therefore, I respectfully dissent.

APPENDIX B
MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 30, 2003 AND AMENDED ORDER DATED JANUARY 8, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO.: 97-497 (WJM)

E.I. DU PONT DE NEMOURS AND COMPANY, CONOCO INC., and SPORTING GOODS PROPERTIES, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF THE ARMY, UNITED STATES DEPARTMENT OF ENERGY, UNITED STATES DEPARTMENT OF THE INTERIOR, AND UNITED STATES DEPARTMENT OF THE NAVY,

Defendants.

MEMORANDUM OPINION

FILED: December 30, 2003.

Appendix B

MARTINI, District Judge.

On January 29, 1997, E.I. Du Pont De Nemours (hereinafter "DuPont" or Plaintiffs) and other captioned Plaintiffs brought an action for the recovery of environmental clean-up, removal, and response costs against the United States of America and named departments of the national government (hereinafter United States or the Government or Defendants). The Complaint specified fifteen named facilities located in New Jersey and in other states. The Complaint was brought under three theories of liability: (Count 1) Section 107(a) of CERCLA,[1] 42 U.S.C. § 9607(a)-direct liability; (Count 2) Section 113(f) of CERCLA, 42 U.S.C. § 9613(f)-contribution liability; and (Count 3) recoupment liability under Sections 113(f) and 113(g) of CERCLA. On December 31, 1997, Judge John C. Lifland dismissed without prejudice the first and third counts as to all Defendants. Therefore, only count two, the CERCLA contribution theory of liability under Section 113(f), remains.

The parties have proceeded with attempts at mediation. Unfortunately, to date, these efforts have failed. Pursuant to a pretrial order of Magistrate Judge Hedges, the parties have engaged in extensive discovery with regard to the Louisville, Kentucky facility. The purpose of this focused discovery was to allow that single facility to provide a test case before

1. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub.L. 96-510, 94 Stat. 2767. CERCLA has since been amended, primarily by the Superfund Amendments and Reauthorization Act of 1986 (hereinafter "SARA"), Pub.L. No. 99-499, 100 Stat. 1613. CERCLA is codified, as amended, at 42 U.S.C. §§ 9601-75.

proceeding to costly and time consuming pretrial and trial proceedings with regard to the remaining fourteen sites and to allow the parties an opportunity to settle their dispute as briefing on legal and factual issues clarified the parties' competing claims and defenses. Discovery is now complete. Before this Court is Defendants' motion for summary judgment.[2]

This matter has been fully briefed. Oral argument was held on November 24, 2003. The Court has carefully considered the relevant law (including persuasive case law authority from other jurisdictions), the submissions of the parties, the record as a whole, including oral argument, and has drawn all reasonable inferences in favor of the non-

2. Defendants have also brought a separate motion for partial summary judgment and the parties have brought several motions relating to discovery-including Plaintiffs' two motions in limine to exclude the testimony of two of Defendants' expert witnesses. Because the Court grants Defendants' summary judgment motion, the Court has no reason to address these subsidiary motions here. This memorandum only addresses the United States' primary summary judgment motion. *See* United States' Memorandum in Support of Motion for Summary Judgment (Sept. 9, 2003); Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment (Sept. 26, 2003); United States' Reply in Support of Motion for Summary Judgment (Oct. 6, 2003). This memorandum does not address Memorandum in Support of United States' Motion for Partial Summary Judgment Concerning Response Costs Caused by DuPont's post 1948 Operations (Sept. 26, 2003); Plaintiffs' Brief in Opposition to Defendants' Motion for Partial Summary Judgment Concerning Response Costs Caused by DuPont's post 1948 Operations (Sept. 26, 2003); Reply Memorandum in Support of the United States' Motion for Partial Summary Judgment Concerning Response Costs Caused by DuPont's post 1948 Operations (Oct. 6, 2003).

movant. The Court concludes with regard to Plaintiffs' one remaining cause of action, Count 2 bringing an action pursuant to CERCLA Section 113(f) contribution liability, that there is no issue of genuine material fact that might affect the outcome of the suit under governing law.[3] Therefore for the reasons elaborated below, the Court GRANTS Defendants' motion for summary judgment.

I. INTRODUCTION

In or about 1941, DuPont began to operate a plant in Louisville, Kentucky (hereinafter "the Facility"). During World War II, and pursuant to contracts with the Defendants, the Facility manufactured the following products for the Defendants: neoprene, calcium carbide, butadiene, chlorobutadiene, and mono-vinylacetylene. *See* Pl. Compl. ¶¶ 48-49.

With respect to the Facility, the Government has admitted that the Defense Plant Corporation (hereinafter "DPC") owned the Facility between 1942 and 1948; that the United States has succeeded to any CERCLA liability arising from DPC's ownership of the property; that between 1942 and 1948 at least one hazardous substance was disposed of at the Facility; that there has been a release of or a threatened release of at least one hazardous substance from the Facility into the environment; and that this release or threat of release has caused DuPont to incur environmental response costs.

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3. It is worth noting that the Court reaches its position on a pure matter of law. As such, this litigation could have been equally well disposed of on a motion to dismiss under the standards of Fed.R.Civ.P. 12(b)(6).

Appendix B

See Memorandum and Order at 3-4, Civ. A. No. 97-497(JCL) (March 2, 2000).

DuPont does not dispute that since 1948 it has owned the Facility. *See* Report of Robert M. Zoch at 17 (hereinafter "Zoch Report"). Nor does DuPont dispute that under prevailing CERCLA law, it is liable for some equitable share of the clean up costs for pre-1948 and/or post-1948 environmental harms. *See id.* at 4.

II. STANDARD OF REVIEW

Summary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. An issue of material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-movant. In deciding a motion for summary judgment, the Court must construe the facts and reasonable inferences from those facts in a light most favorable to the non-movant. However, only disputes about facts that might affect the outcome of the suit under governing law will preclude entry of summary judgment. Once the initial moving party has carried its initial burden of establishing an absence of a genuine issue of material fact, the non-movant must do more than simply show that there is some metaphysical doubt as to those facts. No issue for trial exists unless the nonmoving party can adduce sufficient evidence favoring it on the disputed factual issue such that a reasonable jury could return a verdict in that party's favor. *See* Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505,

91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

III. LEGAL ISSUES AS PUT FORWARD BY THE PARTIES

In the instant motion, Defendants have advanced three arguments supporting summary judgment. Defendants primary argument is that CERCLA Section 113(f), 42 U.S.C. § 9613(f), does not create liability against the United States in the absence of a prior or ongoing Section 106 or Section 107 action, 42 U.S.C. §§ 9606-07. The Government supports its position on the basis of the canons of statutory interpretation and the argument put forward by the dissenters in *Aviall II*.[4] The Plaintiffs vigorously contest the Government's legal position and support their position largely relying on the argument put forward by the majority in *Aviall II:* a recoupment action-even absent a primary lawsuit brought against the contribution action plaintiff-satisfies the procedural requirements of CERCLA. In the alternative Plaintiffs argue that a (state or federal) RCRA permit program satisfies the indicia necessary for a primary action, a necessary procedural precondition of a contribution action in the CERCLA context. In the Third Circuit, however,

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4. *Aviall Services, Inc. v. Cooper Industries, Inc.*, 312 F.3d 677 (5th Cir.2002) (en banc) (hereinafter "*Aviall II*"), *pet. for cert. filed* (02-1192), *rev'd*, 263 F.3d 134 (2001) (2 to 1 decision) (hereinafter "*Aviall I*"), *aff'd*, Civ. A. No. 397-CV-1926D, 2000 WL 31730 (N.D.Tex.2000) (Fitzwater, J).

the precise reach of Section 113(f) is settled.[5] For this reason, the Court is not persuaded by the interpretive position put forward by either the *Aviall II* majority *or* the dissenters. (And for reasons made clear below, a RCRA permit program cannot function as a primary action or lawsuit making possible a derivative contribution action.) Rather, the Court puts forward an alternative interpretation of the statute as controlled by the law of this Circuit.

The Government puts forwards two additional defenses: (i) a statute of limitations defense; and (ii) a defense based upon Plaintiffs' allegedly having failed to clean up the Louisville sites consistent with the National Contingency Plan. The Court examines these two defenses summarily at the end of this opinion.

IV. ANALYSIS

A. The Meaning of CERCLA Section 113(f), 42 U.S.C. § 9613.

The primary question before this Court on this motion is whether or not the CERCLA contribution provision, Section 113(f), 42 U.S.C. § 9613, on these facts and given the particular procedural posture of this case, potentially makes the Government liable to DuPont for clean up,

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5. *See New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir.1997) (Mansmann, J.); *In re Reading*, 115 F.3d 1111 (3d Cir.1997) (Roth, J.); *Morton International, Inc. v. A.E. Staley Manufacturing Company*, 343 F.3d 669 (3d Cir.2003) (Fuentes, J.)

removal, and response costs and damages relating to the Louisville, Kentucky site. Section 113(f)(1) states:

> 42 U.S.C. § 9613(f) *Contribution*
>
> (1) ***Contribution***. *Any person may seek* ***contribution*** *from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title.* Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving *contribution* claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. *Nothing in this subsection shall diminish the right of any person to bring an action for* ***contribution*** *in the absence of a civil action under section 9606 of this title or section 9607 of this title.*

42 U.S.C. § 9613(f)(1) (italics and underscores added).

The two italicized passages above appear—at first blush-to be in some substantial tension. The first italicized passage establishes that a precondition for bringing a contribution claim under this provision is the existence of an ongoing or completed CERCLA suit brought under Section 106 (administrative clean up order issued by the Government) or Section 107 (action for direct liability). *See* 42 U.S.C. §§ 9606-07. It is undisputed that-in the instant litigation-no

such prior suit has been initiated against any party to this litigation. On the other hand, the second italicized passage might suggest that the prior provision is not mandatory, and that an action may be brought by any (injured or potentially responsible) party against any other potentially responsible party (hereinafter "PRP"), at any time—*before, during,* or *after* a Section 106 or 107 action is brought. If this second passage is, in fact, a savings provision, and if this latter interpretation of that provision is correct, then any significant substantive content that might be thought to be found in the prior passage is largely undermined. The briefing of the parties has focused largely-and the Court thinks mistakenly—on this tension.[6] In the Court's view the fundamental legal question that must be resolved is: "What is a contribution action?" And as a subsidiary matter, the Court must also address a related question of application of the law to the facts: i.e. "Given the procedural posture and the uncontested facts of this suit, is this case a proper action for contribution?" In answering these two related questions this Court is faced with a question of statutory interpretation—one that has been squarely addressed by the Third Circuit.

1. What is a Contribution Action under CERCLA?

In the Third Circuit, the Court is guided by the holding of *In re Reading,* 115 F.3d 1111 (3d Cir.1997) (Roth, J.), which defines the legal elements of a contribution action under CERCLA.

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6. The Court does not wish even to remotely suggest any criticism of the briefing of the parties or their presentations at oral argument. Both reached the highest legal standards.

Appendix B

The Court notes that subsection 113(f) is titled "Contribution." Provision 113(f)(1) is likewise titled "Contribution." The word "contribution" is used three separate times within the body of provision 113(f)(1). And, importantly, the term "contribution" is used in each of the two operative clauses granting would-be plaintiffs the right to sue. Textually, there is *no* right to sue under Section 113(f)(1) outside of a "contribution" action. And there is *no* right to sue for CERCLA contribution beyond the ambit of Section 113. *See In re Reading,* 115 F.3d 1111, 1119 (3d Cir.1997) (Section 113(f) replaced judicially created right under Section 107(a)(4)(B)).

The term " 'contribution' is nowhere defined within CERCLA." *Id.* at 1120. Nevertheless, "it is a term with a familiar and readily acceptable meaning." *Id.* The term is used "in its traditional, common law sense." *Id.* at 1124. A contribution action "denotes a claim by and between jointly and severally liable parties for an appropriate division of the payment one of them has been *compelled to make.*" *Id.* (quotation marks omitted) (emphasis added). "Moreover . . . the usual meaning of 'contribution' requires *common liability over to a third-party,* [making the contribution action defendant's] liability to [the contribution action plaintiff] dependent on whether [the contribution action defendant] was potentially liable to the [primary plaintiff]." *Id.* at 1116 (reporting approvingly prior district court proceedings) (emphasis added), *aff'd, In re Reading,* 900 F.Supp. 738, 748 (E.D.Pa.1995) (Ditter, J.). "The right of contribution exists only in favor of a tortfeasor who has *discharged* the *entire* claim for the harm by paying more than his equitable

share of the common liability. . . ." Restatement (Second) of TortsSS ¶ 886A(2) (1977) (emphasis added).[7]

As the parties note in their briefing, prior to the passage of the SARA amendments to CERCLA, the Courts of Appeals were divided with regard to the existence of and the precise reach of contribution actions under the unamended CERCLA statute. This common law development of the statute was arrested when Congress stepped in and passed the SARA amendments. "[T]he language of § 113(f), permitting contribution, *replaced* the judicially created right to contribution under § 107(a)(4)(B)." *In re Reading*, 115 F.3d at 1119 (emphasis added). Congress has affirmatively acted to displace the pre-SARA caselaw. Pre-SARA case law is thus not controlling legal authority: it interprets a statute which no longer exists. Or to put it another way, the pre-SARA case law permitting contribution were interpretations of Section 107. Today, only case law interpreting Section 113 is relevant to determining the now in force boundaries of a contribution action. Moreover, pre-SARA caselaw must even lack significant persuasive authority unless there is some substantial reason to believe Congress implicitly adopted the prior caselaw when passing the statute. For example, indicia of such congressional adoption of prior caselaw may be found either (i) if Congress had adopted language found in that caselaw into the text of Congress' statute (i.e. the SARA amendments), or (ii) if Congress approvingly or systematically cited that prior case

7. The Court notes that Restatement (Second) of Torts ¶ 886A is frequently cited by the Third Circuit as persuasive authority in CERCLA matters. *See, e.g., In re Reading*, 115 F.3d at 1124.

law for the point now in dispute in the legislative history of the statute. Here, Congress has done neither.[8]

2. Given the procedural posture and the uncontested facts of this suit is this case a proper action for contribution?

As explained herein, a CERCLA contribution action can only be brought in three circumstances: (i) a contribution action may be brought during or after a CERCLA Section 106 or Section 107 action; (ii) a contribution action may be brought following a judicially or administratively approved settlement of CERCLA liability pursuant to CERCLA Section 113(f)(3); or (iii) a contribution action may be brought pursuant to the so-called savings clause. *See* 42 U.S.C. § 9613(f)(1) ("Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 . . . or section 9607."). The Court will discuss each of these possibilities in turn.

8. Obviously, the legislative history of the SARA amendments cites much pre-SARA caselaw approvingly. But for the purposes of this motion, the Court is only interested in such citations for the point in dispute-can a PRP bring an action against another PRP absent a primary lawsuit. In response to a query from this Court with regard to whether or not Congress in the legislative history cited prior caselaw for this particular point, Plaintiffs informed the Court: "Congress did not cite this caselaw that allowed contribution before an action under Section 106 or Section 107 at all." *See* Plaintiff's Citations to Accompany Oral Argument (Dec. 2, 2003) (Section III Response to Question # 1). The Plaintiffs' candor is much appreciated. The Court had already arrived at the same conclusion having examined the legislative history.

Appendix B

a. Can DuPont bring its Contribution Claim founded upon a primary action brought pursuant to CERCLA Section 106 or Section 107?

DuPont cannot meet this threshold standard. There is no primary lawsuit in this litigation. There is no "original litigation." There is no Section 106 or Section 107 action.

Furthermore, although Congress used "contribution" in its traditional, common law sense, Congress also to some extent expanded the conditions in which a CERCLA contribution action could be brought beyond that which would otherwise be defined by the mere common law definition. If the primary action brought by an innocent injured party or by the Government is a Section 107 action, or if the primary action is an administrative Section 106 action initiated by the Government, the contribution action plaintiff may bring its contribution suit against the contribution action defendant prior to final judgment or settlement with the primary plaintiff. In this situation, where the primary action was either a Section 106 or Section 107 action, Congress, sensitive to the vast liability and hardship associated with CERCLA actions, sought to facilitate cost sharing early in the proceedings. The policy goal here was to allow the Government or an injured *innocent* party bringing a primary action to avail itself of the maximal resources among all wrongdoers. *See, e.g.*, House Energy and Commerce Committee Report 99-253 to H.R. 2817 (Nov. 12, 1985), *as reported at*, 1 SARA/The Superfund Amendments and Reauthorization Act of 1986: The Legislative History 113:41 (1987) (hereinafter "SARA Leg.

Hist.") ("This provision should also encourage private party settlements and cleanup since the actuality of being brought into litigation as a thirdparty defendant, concurrent with *the original litigation,* has the effect of bringing all such responsible parties to the bargaining table at an early date.") (emphasis added); *see also* Conference Report to H.R.2005 99-262 (Oct. 3, 1986), *as reported at,* 1 SARA Leg. Hist..at 113:2 ("new section 113(f) for authority by settling parties to seek contribution from non-settlors"). This policy goal has no application when, absent a primary lawsuit, a PRP (an admitted polluter under the statute) sues another PRP- the procedural posture of this litigation.[9]

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9. The Court believes the *dicta* of the Third Circuit in *In re Reading,* 115 F.3d 1111 (3d Cir.1997), supports the interpretive position put forward here. The Third Circuit held:

> The fact, however, that a direct action might be brought under § 107(a) does not open the door for a PRP to bring an action for contribution under the same section. Indeed, the fact that § 113(f)(1) specifically permits an action for contribution to be brought "in the absence of a civil action under . . . section [107]" reinforces our conclusion that Congress intended § 113 to be the sole means for seeking contribution- *at whatever time in the cleanup process the party, seeking contribution, decides to pursue it.*

Id. at 1120 (emphasis added). Plaintiffs have apparently interpreted the Third Circuit's *dicta* as carte blanche authority to bring a contribution absent a prior Section 106 or Section 107 action and absent any primary lawsuit. This Court believes the Third Circuit was merely noting what is obvious to all who have labored under CERCLA. The timing of many of CERCLA's provisions is not tied

(Cont'd)

b. Can DuPont bring an action for contribution founded upon a prior settlement made pursuant to Section 113(f)(3)?

In the instant litigation, there is no prior settlement. Liability to the primary plaintiff (whoever that may be) has not been discharged by any settlement. Moreover, Plaintiffs have not pled for relief under Section 113(f)(3).

(Cont'd)

to actual cleanup-its beginning or its ending. Rights under CERCLA are frequently timed with respect to litigation decisions, including settlement decisions. Thus, a settlement with the Government-before, during, or after a Section 107 action is brought-will free a party from the risk of being named as a third-party contribution defendant. And concomitantly, in the absence of a settlement, a party may be named, served, and joined as a contribution defendant without regard to whether actual cleanup has already begun. Indeed, textually, the statute of limitations against a contribution action does not begin to run until a settlement or judgment is reached with respect to response costs or damages. *See* 42 U.S.C. § 9613(g)(3) (contribution statute of limitations). The timing of actual clean up, removal or remediation does not control. Thus, as the Third Circuit stated, a contribution action brought under Section 113 can be brought without regard to the "time in the cleanup process the party, seeking contribution, decides to pursue it." *In re Reading*, 115 F.3d at 1120.

c. Can DuPont bring an action for contribution pursuant to the so-called savings clause in Section 113(f)(1)?

i. What is the meaning of the so-called savings clause?

Congress has provided for "contribution [actions] in the absence of a civil action under section 9606 of this title or section 9607 of this title." 42 U.S.C. § 9613(f)(1). The parties hotly contest the legal consequences of this provision. The Court notes that this provision has been extensively discussed by the majority and dissenters in *Aviall II*. This Court believes that both opinions put forward in *Aviall II* are inconsistent with *In re Reading*, controlling law in this Circuit.

First, the Court notes that the dissenters in *Aviall II* held that the so-called savings clause saved causes of action grounded in state law. The Court recognizes that the *Aviall II* minorities' interpretation of the CERCLA statute would demand granting Defendants' motion for summary judgment. Were the Third Circuit to adopt the position of the *Aviall II* dissenters, this Court's judgment would be upheld. Nevertheless, this Court does not adopt the reasoning of the *Aviall II* dissent. In fact, this Court sees little merit in the minority's position in light of the controlling caselaw of this Circuit. The Court believes that the *Aviall II* minorities' position has been largely rejected by the Third Circuit. *Compare In re Reading*, 115 F.3d at 1117 (CERCLA preempts state common law theories of liability), *with Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 125-27 (3d Cir.1991) (finding no conflict between CERCLA and cost recovery provisions

of New Jersey Spill Compensation and Control Act). The Court takes the position that if the purpose of the so-called savings clause were to expressly save *all* state remedies, i.e. the position of the *Aviall II* minority, the Third Circuit would not have, and indeed could not have, distinguished state statutory remedies (not preempted) from state common law remedies (preempted).

Second, the position of the *Aviall II* majority has already been expressly rejected by the Third Circuit. "[T]he language of § 113(f), permitting contribution, replaced the judicially created right to contribution under § 107(a)(4)(B)." *Id.* at 1119. This Court has discovered nothing in the legislative history of the SARA amendments indicating that Congress adopted pre-SARA contribution caselaw allowing a "contribution" action to be brought absent a primary completed or on-going lawsuit. *See supra* note 8 and accompanying text. Because prior caselaw is not controlling, this Court must interpret the statutory text. The text of the so-called "savings clause" only permits "contribution" actions. And a contribution action requires (at least) a prior or ongoing *lawsuit.* The *Aviall II* majority permitted a contribution action absent any such primary lawsuit. Hence, the Fifth Circuit's position must be rejected as inconsistent with established Third Circuit caselaw.

Having rejected the positions of the *Aviall II* majority and minority as inconsistent with the controlling caselaw of this circuit, this Court discusses two *other* possible interpretations of the so-called "savings clause" which are consistent with the law of this Circuit.

First, this provision might allow a contribution action to be brought by the contribution action plaintiff against the contribution action defendant, if the contribution action plaintiff has already been *sued* by the primary plaintiff under the aegis of some other (federal or state) statute or common law cause of action. In other words, although such a contribution action can be brought in "the absence of a civil action under section 9606 . . . or section 9607," 42 U.S.C. § 9613, *the contribution action still must have all the indicia of a common law contribution action* as set forth in Section IV [A][1] above. Therefore, any contribution action brought *pursuant to the so-called savings clause* must meet several procedural hurdles.[10] (The Court notes that Congress expanded on the contribution right by permitting such an action to be brought where the primary action is a CERCLA Section 106 order-not a traditional lawsuit. But no such exception was placed into the savings clause. Thus actions brought *pursuant to the savings clause* must meet all the traditional common law elements of a contribution action: i.e., a prior or on-going lawsuit.)

Second, the so-called savings clause might not create *any* substantive right to bring any contribution action ever, but merely reaffirms the right to bring a contribution action either expressly granted by coordinate CERCLA provisions in the absence of a Section 106 or Section 107 action or expressly granted by other statutes which incorporate by

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10. *See, e.g., In re Reading,* 115 F.3d at 1120 (defining " 'contribution' as the recovery of 'proportional shares of *judgment* from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the *[common primary] plaintiff*'") (*quoting* Black's Law Dictionary approvingly) (emphasis added).

reference CERCLA Section 113. The exact language of the provision bears remembering. "Nothing in this subsection *shall diminish the right* of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title." It is not obvious that these words create any substantive right to contribution. Their plain meaning is that they do not "diminish rights" otherwise created by operation of law: caselaw or statutory law. As explained, in the Third Circuit, the pre-SARA contribution caselaw has been displaced by the SARA amendments. With regard to statutory law, the only CERCLA related provision expressly creating a right to contribution is Section 113(f)(3) (allowing for contribution following settlement of CERCLA claims with the primary plaintiff). The Court is aware of no other statute incorporating by reference the CERCLA contribution action provision. Therefore, under this interpretation, the so-called savings clause, merely clarified that a settlement releasing a would-be contribution action plaintiff from CERCLA liability against the primary plaintiff or settlor, allows the contribution action plaintiff to bring a contribution action-even absent any prior lawsuit under Section 106 or Section 107. Such a settlement discharges liability owed to the primary plaintiff. Here too, settlement has all the hallmarks of a traditional contribution action. *See, e.g.*, Restatement (Second) of Torts ¶ 886A(2) & cmt. d (1977) (discussing settlement as a precondition of contribution liability).

To summarize, under either of the two interpretations explained above, the contribution action plaintiff must still meet *all* the usual preconditions of a *contribution* action, if only because that word is used in the so-called savings clause.

In so holding, the Court construes the actual text of the provision[11] in conformity with the controlling case law of the Third Circuit. *See In re Reading,* 115 F.3d 1111, 1120 (3d Cir.1997) ("We rely therefore on CERCLA's plain meaning. . . ."). Furthermore, even were this Court to adopt the *general* interpretive approach of the *Aviall II* majority (savings clause saves pre-SARA case law permitting contribution) or minority (savings clause saves state causes of action), it would be bound by the Third Circuit's express mandate that a CERCLA contribution action conform to the traditional, common law understanding of that term, at least absent the express exceptions in the statute itself. *See, e.g.,* 42 U.S.C. § 9613(f)(1) (contribution action may be predicated on a mere *administrative order* pursuant to Section 106). To put it in the simplest terms, this case is an action for recoupment or reimbursement, and as such it is precluded by the law of this circuit. *Cf. In re Reading,* 115 F.3d at 1124 ("it is inherent in the concept of contribution that the persons commonly liable be liable to the same entity. Otherwise, contribution could become an endless circle of attempts to seek reimbursement from unrelated parties.").

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11. *But see* Oral Argument Trans. 45:10-14 (Nov. 24, 2003) (Mr. Hyatt for Plaintiff: "The first sentence of 113(f)(1) confirms you can bring [the contribution action] sooner and the last sentence of 113(f)(1) confirms that you can bring it even in the absence of a civil action under section 106 or 107. It is difficult to read that sentence any other way because that is exactly what it says."); *id.* at 45:2-5 ("[This action] is what the Courts of Appeals around the country have called the quintessential action for contribution by one covered person responsible party under the statute against another person under the statute").

ii. Is the procedural posture of this case consistent with the meaning this Court applies to the so-called savings

Question: Can Plaintiffs seek relief under this Court's second interpretation of the so-called savings clause (i.e., a contribution action may follow a settlement releasing the contribution action plaintiff from CERCLA liability)? Obviously, if the so-called savings clause merely clarifies the right to bring a CERCLA action following a settlement discharging CERCLA liability (and in the absence of any prior lawsuit under Section 106 or Section 107), then DuPont's action here must fail as a matter of law.

Question: Can Plaintiffs seek relief under this Court's first interpretation of the so-called savings clause (i.e., a contribution action-even one absent a Section 106 or Section 107 primary action-must have all the indicia of a traditional common law contribution action)? Here too, Plaintiffs' claim must fail as a matter of law. Plaintiffs have argued both: (i) that the requirements of the two RCRA permit programs "mandated" by Kentucky and the United States are the primary actions making possible DuPont's derivative contribution action against the United States, and (ii) no primary action is necessary under pre-SARA caselaw. (The Court has already addressed DuPont's second argument: see *supra* note 8 and accompanying text.) For the following reasons the Court holds that the requirements of RCRA permit program fail as matter of law to meet the requirements of a traditional, common law contribution action.

Appendix B

First, a contribution action requires two parties who are jointly and severally liable to some *third-party. See In re Reading,* 115 F.3d at 1116. Plaintiff here has argued that the DuPont can seek contribution against the United States even though the so-called primary action under RCRA was brought by an arm of the United States Government. But if the United States is both the primary action plaintiff and contribution action defendant, then this suit is *not* a traditional contribution action in any normative sense. (The Court notes that there is no clear admission in the record by DuPont that DuPont is liable to Kentucky or to the municipality of Louisville or to any innocent landowner.) Admittedly, that still leaves open the possibility of common liability owed to Kentucky pursuant to Kentucky's RCRA permit program which (like the federal permit) "mandates" that DuPont take on specified response, remedial, and/or clean up costs as a precondition and/or continuing condition of its RCRA permit program.

Second, a contribution action "denotes a claim by and between jointly and severally liable parties for an appropriate division of the payment one of them has been *compelled to make.*" *In re Reading,* 115 F.3d at 1116 (emphasis added). Traditionally, compulsion in this sense embraces obligations created by law: a statutory obligation or service of process leading to adverse litigation. DuPont here faces neither. DuPont has *applied* for the Kentucky permit.[12] A permit

12. *See* Appendix to Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment ex. 2, DKY 0000178 ("This permit is based on the assumption that the information in the permit *application* submitted October 28, 1985 . . . is accurate.") (emphasis added).

program is not compulsion in any normative sense. The simple fact is DuPont could legally choose not to use the Kentucky site for industrial or commercial purposes. DuPont could sell or gift the land. DuPont could allow the land escheat to the state for failure to pay taxes. In all these cases, DuPont need not apply for the RCRA permit. Admittedly, such choices are economically burdensome. But they establish that DuPont's choice to seek a RCRA permit is not compelled in any traditional sense. And even if in some abstract sense burdensome economic regulations could be deemed compulsion, this is assuredly not the compulsion associated with a common law action for contribution. In the contribution setting, compulsion must refer to service of process dragooning an unwilling defendant into court against his will. *See, e.g.*, Restatement (Third) Torts/ Apportionment of Liability ¶ 23 cmt. b (1999) ("A person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of the liability, *either by settlement with the plaintiff or by satisfaction of judgment.*") (emphasis added). Such a judicial proceeding could ultimately result in a victory for the would-be contribution plaintiff (rendering a contribution action unnecessary), or settlement or final judgment against the contribution action plaintiff. Because DuPont was not compelled to seek the Kentucky permit, and because the Kentucky permit program is not a judicial action for relief, DuPont's claim must fail as a matter of law. (Obviously, the same arguments could be made with regard to United States' RCRA permit program.)

Third, "[t]he right of contribution exists *only* in favor of a tortfeasor who has *discharged* the entire claim for the harm

by paying more than his equitable share of the common liability. . . ." Restatement (Second) of Torts ¶ 886A(2) (1977) (emphasis added). A claim can only be discharged by entry and satisfaction of final judgment, or by settlement. Even assuming that the primary plaintiff in this action is Kentucky, and even assuming that DuPont's clean up costs to date might reduce any claim that might be brought in the future by Kentucky against the United States, this Court (during these proceedings) can make no finding that any such actions by DuPont *discharged* the entire claim or even any part of that claim. As a matter of elementary due process, such a finding would require that Kentucky have at least the benefits of notice, an opportunity to be heard, service of process and formal joinder. Quite obviously Kentucky is not a party to this case. Therefore, this Court can make no findings that any claim (or part thereof) has been discharged. Therefore, DuPont's claim for contribution must fail as a matter of law. To put it another way, although this Court's equitable powers to do substantial justice are extensive, this Court has no power to discharge the claim of some yet unnamed, unserved, unjoined, unrepresented third-party (i.e. Kentucky, Louisville, or some other innocent third-party) to whom both DuPont and the United States (might) share common liability. Any attempt by this Court to declare the third-party's claim satisfied or discharged by DuPont's past, current, and future response efforts at removal and remediation (pursuant to the RCRA permit) would quite obviously offend the most basic due process norms. *See, e.g., Martin v. Wilks,* 490 U.S. 755, 762, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (Rehnquist, C.J.) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.").

Fourth, a traditional, common law contribution action requires the discharge of the primary plaintiff's *entire* claim. *See, e.g.,* Restatement (Second) of Torts ¶ 886A(2). There is divided authority on what is meant by an *entire* claim. The phrase "entire claim" may be taken literally: the entirety of the primary plaintiff's claim. Or it may refer merely to the entire claim to which contribution plaintiff is seeking relief against the contribution defendant. In either case, whether the claim is the entirety of plaintiff's primary claim, or just the entire claim to which the contribution action plaintiff is seeking recoupment, the entire claim must be discharged through satisfaction of judgment or settlement. As explained above, DuPont can meet neither standard given the procedural posture of this litigation: an absence of a joined primary plaintiff. Although DuPont continues to take response, remediation-and/or removal actions in conformity with its permit duties, DuPont has nowhere argued that Kentucky's (or anyone else's) *entire* claim has been (or will be) discharged. Hence, the preconditions for a contribution action have not and, indeed, cannot be met.

Fifth, even assuming, as Plaintiffs must, that a CERCLA contribution action might be brought concurrently with a primary action, only a proper *defendant* can bring such an action. *See* Restatement (Second) of Torts ¶ 886A cmt. i ("procedural rules also determine whether *a defendant* who pays more than his equitable share of the obligation may obtain a order for contribution by motion in the original action or must bring a separate suit.") (emphasis added); *cf.* Fed.R.Civ.P. 14(a) ("When *Defendant* May Bring in Third Party.") (emphasis added); Fed.R.Civ.P. 14(b) (plaintiff may implead third-party *only* if counterclaim is asserted against

plaintiff). DuPont is not a defendant in this or any other Kentucky-site clean-up related litigation known to this Court. Thus, Plaintiff DuPont cannot bring a contribution action.

Sixth, although the matter is capable of doubt, the Court believes that the only cause of action permitting a CERCLA contribution action is a primary action brought pursuant to CERCLA or a release from CERCLA liability pursuant to Section 113(f)(3). Thus, a primary action brought under any other federal statute, including a RCRA permit program, absent express statutory authority, is insufficient to permit the derivative CERCLA contribution action. Likewise, a primary action brought under state common law (e.g., trespass or nuisance) or state statutory law (e.g., state analogues to CERCLA), is also procedurally insufficient to permit a CERCLA derivative contribution action. *It is the Court's view that the purpose of the so-called savings clause was to clarify that a contribution action brought following a settlement under the aegis of Section 113(f)(3) should not be held to be procedurally insufficient because of an absence of a prior primary action brought pursuant to CERCLA Sections 106 or 107.* The Court believes that this interpretation is compelled by established Third Circuit case law. *See, e.g., In re Reading,* 115 F.3d at 1114 ("[W]e determine that the [contribution action plaintiff's] claim fails as a matter of law because [the contribution action defendant] is not liable to [the primary plaintiff] under [CERCLA] **§ 107(a)**. . . .") (emphasis added). If any theory of liability, state or federal, between the contribution action defendant and the primary plaintiff would do to establish the procedural preconditions for contribution liability, then the Third Circuit's requiring Section 107 liability in *In re Reading* is

difficult, at best, to understand.[13] In short, absent a Section

13. The Court's holding may appear to be in tension with *Morton International, Inc. v. A.E. Staley Manufacturing Company*, 343 F.3d 669 (3d Cir.2003). *See also* Plaintiff's Citations to Accompany Oral Argument (Dec. 2, 2003) (citing *Morton, supra*, and persuasive authority from other circuits, as holding that a contribution claim is "allowed . . . where no CERCLA 106 or 107 action preceded the claim."). This Court disagrees with DuPont's restatement of the *Morton* holding. In *Morton*, the Third Circuit noted that "[s]ince [the enactment of CERCLA], [Plaintiff] Morton has been funding the environmental efforts under various judicial orders." *Id.* at 673-74. The Third Circuit did not explain what court issued the orders, or the underlying statutory or common law basis for those orders. The nature of those orders was not litigated (or discussed by the parties' papers) before the Third Circuit on appeal. There may (or may not) have been a prior CERCLA Section 106 or Section 107 action, or a release from CERCLA liability—anyone of which would permit a contribution action. Moreover, the *Morton* Court did not expressly overrule *In re Reading*. In this situation, the on—point and litigated holding of *In re Reading* is and remains binding precedent in spite of the ambiguities of *Morton*. *See United States v. Monaco*, 23 F.3d 793, 803 (3d Cir.1994) ("[N]o panel of this court may overrule the holding of a previous panel. Only the *in banc* court may do that. To the extent that the decision of a later panel conflicts with existing circuit precedent, we are bound by the earlier, not the later, decision.") (*citing* Internal Operating Procedure of the United States Court of Appeals for the Third Circuit 9.1); *United States v. Sclafani*, 996 F.Supp. 400, 405 (D.N.J.1998) (Orlofsky, J.) ("In general, to the extent that the decision of a later panel conflicts with prior Third Circuit precedent, this [district] court remains bound by the earlier, not the later, decision.").

Moreover, *Morton* can be distinguished from the instant litigation in another way. In *Morton*, the contribution action plaintiff

(Cont'd)

106 or Section 107 primary action or a settlement pursuant to Section 113(f)(3), DuPont cannot bring a contribution action.

The Court freely acknowledges that its reliance on the procedural strictures relating to contribution actions found in *In re Reading* and *The Restatement* may limit the ability of some PRPs to recoup cleanup costs from other PRPs. And the Court also acknowledges that this result might very well hamper some PRP efforts at removal and remediation of hazard waste sites. If the Court believed that the statute were ambiguous or if the Court believed that the meaning of the term "contribution" were unsettled when Congress wrote the SARA amendments, then the Court would of necessity turn to the general purposes of the statute to determine the reach of the provision. *But see Aviall II,* 312 F.3d at 680-81. But here the statute's terms appear reasonably clear. Any effort by this Court to extend the legal boundaries of a traditional contribution action into a pure recoupment or reimbursement action would not be interpreting the CERCLA statute, but rather would be rewriting the statute.[14] *See In re Reading,*

(Cont'd)
was the *defendant* in a prior action and that action went to *final judgment. Morton,* 343 F.3d at 673-74 (*citing Morton Int'l, Inc. v. General Acc. Ins. Co. of America,* 134 N.J. 1, 629 A.2d 831 (1993), and *State Dep't of Environmental Protection v. Ventron Corp.,* 94 N.J. 473[, 468 A.2d 150] (1983)). In the instant litigation, the RCRA permit programs are even now on-going. And they can never reach final judgment.

14. *But see* Oral Argument Trans. 48:12-15 (Nov. 24, 2003) (Mr. Hyatt for Plaintiff: "In order to reach the interpretation your
(Cont'd)

115 F.3d at 1124 ("§ 113(f) . . . adopts [ ] the . . . traditional sense of contribution"). This is not the Court's role.

Moreover, the Court believes that its position with regard to the liability-creating reach of the term "contribution" is consistent with the basic norms of our democratic processes. "By the time a bill reaches the floor of the House or Senate, it reflects a myriad of political bargains and compromises." Mark Seidenfeld, *A Civil Republican Justification for the Bureaucratic State,* 105 Harv. L.Rev.. 1511, 1545 (1992). Under such conditions, it is logical to expect that a majority coalition seeking to protect the environment will create low floors establishing broad liability among PRPs. But one should also expect that other elements of the majority coalition will create some ceilings defining, channeling, minimizing, and rendering liability predictable and orderly thereby facilitating the possibility of business' procuring insurance. Once the compromise is embodied in the statute's text, it is the Court's task to protect the deal as written, not

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(Cont'd)

Honor's question suggests, there has to be some way of stopping the spread of the last sentence of [CERCLA Section] 113(f)(1) and the language contains no method for stopping that spread."). The Court disagrees: the statute's very use of the term "contribution" is some substantial limit on the ability of a PRP to bring a CERCLA Section 113(f) action. *See In re Reading,* 115 F.3d 1111 (3d Cir.1997) (precluding derivative action brought by contribution action plaintiff because contribution action defendant was not liable to primary plaintiff). It is worth noting that in *In re Reading,* the primary plaintiff-the United States-was a named party to the action. In the instant litigation, there is no named, served, joined, or represented primary party.

to rewrite the deal in favor of the largest faction within the coalition that passed the legislation.

> What matters is for the judge to form a view of these purposes that is continuous with the real world of discourse and conflict from which that fragment of law came. Moreover, the view should recognize the contestable and factional quality of each of the interests, concerns, and assumptions to which it appeals. They count not because they are the best and wisest but because they won, and were settled, earlier down the road of lawmaking.

ROBERTO M. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME 114 (1996). The Court is of the view that the very use of the term "contribution" embodies a political compromise determining the boundaries of future CERCLA actions.

B. Policy Considerations relevant to interpreting CERCLA Section 113(f), 42 U.S.C. § 9613.

Although policy considerations alone do not determine the Court's interpretation of the CERCLA statute, the Court notes several such considerations generally supporting its interpretation.

First, the Court's approach generally leaves the policy arms of the Executive Branch with the discretion to make determinations as to site priority, particularly when the Government's money is expended. There are exceptions. State entities representing the public, Indian tribes, and

innocent landowners[15] may nevertheless bring Section 107 actions against the Federal Government irrespective of the policy choices of the Executive Branch. Unlike these particular entities, expressly mentioned in the statute, DuPont does not represent the public, is not a quasi-sovereign entity, and, on the facts of this case, is not an innocent landowner. Because the equities are substantially different, there is substantially less reason to allow DuPont a free hand with regard to initiating an action attaching monetary liability to the Federal Government.

Second, the Court believes the environmental regulators within the Federal Government are institutionally better situated to determine the public interest when selecting among competing clean up sites than DuPont (and this Court). DuPont has a substantial interest in cleaning up its sites-irrespective of the cost to the Government or the public interest generally. This is particularly true when the movant holds title to the site and substantial economic rents accrue to the party if *its* property ultimately becomes environmentally sound following clean up. But the Government's perspective (or so one hopes) is somewhat larger. The Government has no *particular* interest in DuPont's sites. The Government is charged with clean up of *all* SuperFund sites and in the process it must *choose* those sites demanding the most immediate action, and those sites having the best claim against the Government's all too limited

15. Whether or not an innocent landowner can bring a Section 107 action against the Government is an issue that is not properly before this Court. Similarly, this precise question has not been briefed by the parties. The Court believes that this is a question of law that has not yet been settled by the Third Circuit.

treasury. The Executive Branch is better situated to make this determination than DuPont.

C. The Government's Statute of Limitations Defense.

The Government has put forward a statute of limitations defense. The Court does not reach this defense. The correct interpretation of CERCLA's statute of limitations provisions is intimately tied to the reach of liability under the substantive contribution provision. If this Court's interpretation of the reach of liability is upheld throughout the process of appellate review, then addressing the statute of limitations defense is wholly nugatory. Moreover, if the law of CERCLA contribution liability is clarified on direct appeal or in related proceedings,[16] the Court fully expects that any such clarification will also extend to guiding the district court (on remand or on reconsideration) with regard to the reach of the (relevant) CERCLA statute of limitations provisions.

D. DuPont has not failed to Comply with 40 C.F.R. § 300.700.

The Government argues that DuPont's claim for recovery of its CERCLA response costs must be rejected (in part) because DuPont has failed to substantially comply with the

16. A petition for writ of certiorari was filed in *Aviall II*. The Supreme Court entered an order requesting briefing from the Solicitor General's office on behalf of the United States. See *http://www.supremecourtus.gov/orders/courtorders/042103pzor.pdf* (order list of April 21, 2003) (last visited Oct. 26, 2003). The Solicitor General submitted its brief some time in December 2003.

National Contingency Plan's (hereinafter "NCP") provisions. These provisions generally require public notice and participation prior to and during the responsible party's removal action. Plaintiffs counter-argue that DuPont has, in fact, substantially complied, and that participation by state government environmental regulators during the removal action is a substitute for complying with the NCP provisions relating to public participation. *See* CERCLA Section 105, 42 U.S.C. § 9605; *see also* 40 C.F.R. § 300.700. As explained below, the Court has no reason to directly reach Defendants' argument (i.e. state government regulators' participation is a substitute for public participation under the NCP). Rather, the Court has determined that 40 C.F.R. § 300.700 has no application to a response action claim brought under the aegis of CERCLA Section 113, 42 U.S.C. § 9613. In other words, the Court's position is that 40 C.F.R. § 300.700 does not apply to a contribution action plaintiff, but only applies to plaintiffs bringing primary actions under Section 107 (and in other discrete situations listed by the regulation, but having no relation to the facts of this litigation).

The parties have agreed that for the purposes of this motion and for the particular site and site sub-locations discussed in the motion that the provisions of the Code of Federal Regulations apply as they were in force in 1990 and 1994-depending on the particular details of the response action. Both parties labor under the assumption that 40 C.F.R. § 300.700(c)(2) applies to the instant action:

> Responsible parties shall be liable for necessary costs of response actions to releases of hazardous substances incurred by any other person consistent with the NCP.

40 C.F.R. § 300.700(c)(2), *as reported at,* 55 F.R. 8858 (March 8, 1990) and 59 F.R. 47452 (Sept. 15, 1994). Although the language of the regulation, *supra,* is general, and it appears to embrace the facts of the current action, this subsection falls within § 300.700(c). That provision is titled: "*Section 107(a) cost recovery actions.*" Searching the length and breadth of this regulation, one finds nothing indicating that the reach of the regulation extends to cost recovery actions brought under Section 113(f). Rather, there are substantial reasons to believe that the reach of subsection (c)(2) extends only to Section 107 cost recovery actions. The instant litigation is not a Section 107 cost recovery action. *Therefore DuPont cannot be out of compliance with the regulation.*

First, as the Court explained above, the title of this provision indicates that the subprovision's reach extends to Section 107 actions only. *Second,* the language of § 300.700(c) mirrors the precise language found in Section 107, not Section 113(f).

> 42 U.S.C. § 9607(a)(4)(A): all costs of removal or remedial action incurred by the *United States Government or a State or an Indian tribe not inconsistent with the national contingency plan*
>
> 40 C.F.R. § 300.700(c)(1): Responsible parties shall be liable for all response costs incurred by the *United States government or a state or an Indian tribe not inconsistent with the NCP.*

and

> 42 U.S.C. § 9607(a)(4)(B): any other *necessary costs of response incurred by any other person consistent with the national contingency plan*
>
> 40 C.F.R. § 300.700(c)(2): Responsible parties shall be liable for *necessary costs of response* actions to releases of hazardous substances *incurred by any other person consistent with the NCP.*[17]

Third, each subsection of § 300.700, (c) through (f), is an expansion on subsection (b). 40 C.F.R. § 300.700(b) states:

> *Summary of CERCLA authorities.* The mechanisms available to recover the costs of response actions under CERCLA are, in summary: (1) Section 107(a) . . . (2) Section 111(a)(2) . . . (3) Section 106(b), and (4) Section 123.

Again, nothing here embraces recovery of response costs under the contribution provision, CERCLA Section 113(f), absent one of the listed underlying actions, including Section 107.

This interpretation of the regulation is wholly consistent with this Court's interpretation of the underlying statute. In a traditional contribution action, the primary plaintiff has begun (or hopes to begin) removal and remediation actions. The primary plaintiff's actions are addressed in terms of

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17. Italics has been added to illustrate similarities between the statute and the regulation.

compliance with the NCP. If that plaintiff fails to comply, then the defendant (i.e., the contribution action plaintiff) is not liable and the Court then need not address derivative liability between the contribution action plaintiff and contribution action defendant. In other words, the regulation is geared to the primary action, not the derivative action. It has no application in this litigation because there is no primary lawsuit.

Under these circumstances, the Court has no reason to reach the details of Plaintiffs' or Defendants' rival positions relating, in large part, to whether or not the participation of state government regulators in Plaintiffs' response action acts as a substitute for the public participation requirement under the regulation. *See* 40 C.F.R. § 300.700(c)(5 & 6). If the Court's position in this regard is upheld on appeal, then any ruling by this Court on the relative merit of the parties' competing positions with regard to state government participation as a substitute for public participation under the NCP would be unnecessary dicta. The Court need not reach that question: the question briefed by the parties. On the other hand, if this Court's position with regard to the federal regulation at issue is not upheld and concomitantly if this Court's interpretation of the underlying question of statutory construction is also rejected on appeal, the Court fully expects clarification of the relevant rule of law from the Third Circuit with regard to interpreting the disputed regulatory provision.

V. CONCLUSION

For the reasons set forth above, the Court GRANTS Defendants' motion for summary judgment.

Summary judgment is GRANTED with respect to Count 2: Section 113(f) of CERCLA, 42 U.S.C. § 9613(f).

A separate order will be entered consistent with this opinion.

On this day of 30th December, 2003

s/ William J. Martini
William J. Martini, U.S.D.J.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO.: 97-497 (WJM)

E.I. DU PONT DE NEMOURS AND COMPANY, CONOCO INC., and SPORTING GOODS PROPERTIES, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF THE ARMY, UNITED STATES DEPARTMENT OF ENERGY, UNITED STATES DEPARTMENT OF THE INTERIOR, and UNITED STATES DEPARTMENT OF THE NAVY,

Defendants.

MARTINI, District Judge:

AMENDED ORDER

* * *

The Court vacates its Order of December 30, 2003.

For the reasons set forth in the *Memorandum Opinion*, the Court GRANTS Defendants' motion for summary judgment.

IT IS on this 8th day of January, 2004.

ORDERED that Defendants' motion for summary judgment is GRANTED with respect to Count 2: Section 113(f) of CERCLA, 42 U.S.C. § 9613(f).

Du Pont's claim with regard to Louisville, Kentucky site is dismissed with prejudice. All claims brought by other names Plaintiffs, or by Du Pont with regard to other sites are not effected by this order.

s/ William J. Martini
William J. Martini, U.S.D.J.

APPENDIX C
OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MARCH 1, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO.: 97-497 (WJM)

E.I. DU PONT DE NEMOURS AND COMPANY, CONOCO INC., and SPORTING GOODS PROPERTIES, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF THE ARMY, UNITED STATES DEPARTMENT OF ENERGY, UNITED STATES DEPARTMENT OF THE INTERIOR, and UNITED STATES DEPARTMENT OF THE NAVY,

Defendants.

OPINION

FILED: March 1, 2004.

Appendix C

MARTINI, District Judge

The facts of this case are discussed in detail in this Court's prior opinion.[1] In that opinion and order, this Court granted the Government's summary judgment motion thereby dismissing with prejudice Du Pont's 113(f)(1) CERCLA contribution claim for the Louisville, Kentucky site. Now before this Court is Plaintiff's[2] Motion for Entry of Judgment under FRCP 54(b) or, in the alternative, for Certification under 28 U.S.C. § 1292(b), and the Defendants' (cross) Motion for Judgment on the Pleadings. The two motions have been fully briefed. Oral argument was held on February 23, 2004.

For the reasons elaborated below, the Court GRANTS Defendants' motion for judgment on the pleadings, and DENIES Plaintiff's motion for entry of judgment under FRCP 54(b) or, in the alternative, for certification under 28 U.S.C. § 1292(b).

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1. *See E.I. Du Pont De Nemours and Co. et al. v. United States et al.*, Civil Action No. 97-497 (WJM), 297 F. Supp. 2d 740 (D.N.J. Dec. 30, 2003).

2. William H. Hyatt, Jr., Esq. and John McGahren, Esq. are the attorneys of record of all captioned Plaintiffs in this action. (Bernard J. Reilly, Du Pont Corporate Counsel, also attended the oral argument.) The motion brought by Attorneys Hyatt and McGahren is styled *"Plaintiff's"* motion. It appears, however, that this motion was brought on behalf of all captioned Plaintiffs and not merely Plaintiff Du Pont, although the record is less than precisely clear. In any event, the Government's FRCP 12(c) motion for judgment on the pleadings is brought *against* all captioned Plaintiffs.

Appendix C

I. STANDARD OF REVIEW

FRCP 12(c) provides: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." As with a motion for summary judgment, the court must view the facts in the pleadings in the light most favorable to the nonmovant. And, the court may only grant the motion if the movant establishes that no material issue of fact remains under the governing legal standard so that the movant is entitled to judgment as a matter of law.

II. ANALYSIS

This Court's prior opinion is law of the case.[3] And it remains law of the case, unless superseded by new statutory authority, overturned by direct appeal, or overruled (explicitly or implicitly) by controlling higher court authority – the United States Court of Appeals for the Third Circuit or the United States Supreme Court. The sufficiency of Plaintiffs' Complaint is determined with respect to the governing legal standard, and this Court's prior opinion *is* the relevant standard.

In that opinion, this Court held that a precondition for bringing a CERCLA § 113(f)(1) action is that the moving

3. *See supra* note 1.

party (a defendant in the current or in some prior action) has either (i) settled a prior CERCLA claim under the aegis of CERCLA § 113(f)(3), or (ii) the moving party has been sued by a third-party bringing a CERCLA claim under 42 U.S.C. §§ 9606, 9607. Indeed, the existence *vel non* of a prior CERCLA suit as a precondition of a party's bringing a derivative contribution claim was the heart of the Government's prior summary judgment motion – which was fully briefed by the parties, discussed at oral argument, and adjudicated by this Court.

Plaintiffs' Complaint and the competent evidence before this Court do not establish or tend to establish that the fourteen remaining sites (unaffected by this Court's prior amended order) are in any material sense distinguishable from the Louisville site. Prior to and during briefing of the Government's current motion, Plaintiffs failed to produce *any* (record) evidence, in the form of affidavits, certifications, copies of agreements settling CERCLA claims, or records of prior judicial or administrative CERCLA § 106 orders or CERCLA § 107 proceedings. Even at oral argument, Plaintiffs did not seek leave to amend their Complaint or permission to make a late filing.[4] Simply put, at this juncture,

4. *But see* Reply Brief in Support of Plaintiff's Motion for Entry of Judgment under FRCP 54(b) or, in the alternative, for Certification under 28 U.S.C. § 1292(b), at 3-4 (Feb. 2, 2004) ("Furthermore, DuPont could amend the Complaint to potentially comply with the Court's Memorandum and Amended Order. For example, at DuPont's Necco Park site in Niagara Falls, New York, DuPont incurred response costs pursuant to an EPA Consent Decree and Administrative Order on Consent."). A party's lawyer's representation is not evidence. Nor does this representation appear in the pleadings. *See* FRCP 12(c) (judgment on the *pleadings*).

there is nothing in the record before this Court establishing or tending to establish with regard to any of the remaining sites that any Plaintiff (in the instant action) either has settled a CERCLA § 113(f)(3) claim or has been named a defendant in a (prior or on-going) CERCLA § 106 or CERCLA § 107 action. On this basis the Government has moved for judgment on the pleadings.

Plaintiffs response to the Government's argument is that it "has adequately pled its CERCLA contribution claims" under prevailing Third Circuit law. According to Plaintiffs, a CERCLA contribution claim is well pled if it alleges: (i) that the contribution action defendant is a responsible party under CERCLA § 107(a); (ii) that the site is a CERCLA "facility"; (iii) that hazardous substance were released at the facility; (iv) that the contribution action plaintiff incurred response costs; and, (v) that the response action taken was consistent with the National Contingency Plan. Pl. Reply Brief and Opp'n to Defendants' Motion at 2-3. Plaintiffs' Third Circuit authority is *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258-59 (3d Cir. 1992) and *United States v. CDMG Realty* Co., 96 F.3d 706, 712 (3d Cir. 1996). *Id.* at 3. These cases are not on-point. *Alcan* was a direct CERCLA § 107 brought by the United States against individual private party defendants. It was *not* a CERCLA § 113 action. Thus, there was no reason to expect the *Alcan* court on appeal to discuss the necessity *vel non* of a CERCLA § 113 movant's establishing the existence of a prior CERCLA § 106 or CERCLA § 107 action or settlement. Whether such a requirement must be established at trial or alleged in the pleadings would have been wholly irrelevant to the decision in that case. Likewise, *CDMG* is of no avail to Plaintiffs.

In *CDMG*, HMAT (the contribution action plaintiff) brought a CERCLA § 113(f) contribution action against Dowel (the contribution action defendant), *but HMAT brought its suit only after it was sued by the United States in a direct action under CERCLA § 107. Thus* although the Court of Appeals allowed a suit to proceed based on the first four factors laid out by Plaintiffs above, it was in the context of a lawsuit where all parties agreed that a prior CERCLA § 107 action had already been initiated by the United States against the contribution action plaintiff. It is the absence of a similar CERCLA § 107 action or allegation from Plaintiffs' pleadings in the instant action that renders Plaintiffs' suit deficient under the law of this case as established by this Court's prior opinion and order.

The Court has not considered (or even been presented with) any matters outside the pleadings. And having made all reasonable inferences in favor of the nonmovant, the Court must grant the Government's 12(c) motion as a matter of law.

This Court's ruling here today will not defeat or delay Plaintiffs' appellate rights. Rather than granting partial final judgment, per FRCP 54(b), Plaintiffs will have an opportunity to present the entirety of their case to the Third Circuit *now*. This Court agrees with Plaintiffs: there is no just reason to delay the Third Circuit's hearing this case. But because this Court has been presented with no allegations in the pleadings (or evidence beyond the pleadings) differentiating the Louisville site from the remaining sites, the entire case must be sent to the Court of Appeals for review (or await resolution of similar issues by the United States Supreme Court in *Aviall*). Similarly, this Court denies discretionary appeal pursuant to 28 U.S.C. § 1292(b). This Court does not believe

there is a substantial ground for difference of opinion with regard to the substantive issues in dispute under Third Circuit law. This Court's prior opinion and order was grounded in *In re Reading*, 115 F.3d 1111 (3d Cir. 1997) – settled law in this Circuit.[5]

III. CONCLUSION

For the reasons elaborated above, the Court GRANTS Defendants' motion for judgment on the pleadings, and DENIES Plaintiff's motion for entry of judgment under FRCP 54(b) or, in the alternative, for certification under 28 U.S.C. § 1292(b).

Defendants' motion for judgment on the pleadings is GRANTED with respect to Count 2: CERCLA § 113(f), 42 U.S.C. § 9613(f) with regard to all sites and with respect to claims brought by all Plaintiffs.

This terminates this action.

A separate order will be entered consistent with this opinion.

On this day of 1 March, 2004

s/ William J. Martini
William J. Martini, U.S.D.J.

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5. *But cf. Morton International, Inc. v. A.E. Staley Manufacturing Company*, 343 F.3d 669 (3d Cir. Oct. 21, 2003) (FRCP 54(b) appeal deciding meaning of "arranger" liability); *Tippins Inc. v. USX Corp.*, 37 F.3d 87 (3d Cir. 1994) (deciding meaning of "transporter" liability).

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO.: 97-497 (WJM)

E.I. DU PONT DE NEMOURS AND COMPANY, CONOCO INC., and SPORTING GOODS PROPERTIES, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF THE ARMY, UNITED STATES DEPARTMENT OF ENERGY, UNITED STATES DEPARTMENT OF THE INTERIOR, and UNITED STATES DEPARTMENT OF THE NAVY,

Defendants.

MARTINI, District Judge:

ORDER

For the reasons set forth in the Court's *Opinion* of March 1, 2004, the Court GRANTS Defendants' motion for judgment on the pleadings, and DENIES Plaintiff's motion for entry of judgment under FRCP 54(b) or, in the alternative, for certification under 28 U.S.C. § 1292(b).

Appendix C

IT IS on this 1 day of March, 2004

ORDERED that Plaintiff's motion for entry of judgment under FRCP 54(b) or, in the alternative, for certification under 28 U.S.C. § 1292(b) is DENIED.

ORDERED that Defendants' motion for judgment on the pleadings is GRANTED with respect to Count 2: CERCLA § 113(f), 42 U.S.C. § 9613(f) with regard to all sites and with respect to claims brought by all Plaintiffs.

This terminates this action.

s/ William J. Martini
William J. Martini, U.S.D.J.

APPENDIX D
ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED OCTOBER 30, 2006

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2096

E.I. DUPONT DE NEMOURS AND COMPANY; CONOCO, INC.; SPORTING GOODS PROPERTIES, INC.,

Appellants

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF COMMERCE; UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE ARMY; UNITED STATES DEPARTMENT OF ENERGY; UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES DEPARTMENT OF THE NAVY

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 97-cv-00497
District Judge: Honorable William J. Martini

Present: SCIRICA, *Chief Judge*, SLOVITER, RENDELL, AMBRO, FUENTES, SMITH, FISHER, and MICHEL,* *Circuit Judges*

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* Honorable Paul R. Michel, Chief Judge, United States Court of Appeals for the Federal Circuit, vote limited to panel rehearing only.

Appendix D

SUR PETITION FOR *EN BANC* REHEARING

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED. Judge Sloviter would have granted rehearing.

By the Court,
/s/ Thomas L. Ambro, Circuit Judge

Dated: October 30, 2006

APPENDIX E
STATUTORY PROVISIONS INVOLVED

Comprehensive Environmental Response,
Compensation and Liability Act of 1980,
42 U.S.C.A. §§ 9601 et seq.

The relevant portions of Section 101(21), 106, 107(a), 113(f) and Section 120 are provided below:

Section 101 – Definitions

(21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

Section 106 – Abatement Actions

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected ~~State, take~~ other action under this section including,

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but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines; reimbursement

(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2) (A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a

preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607 (a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28.

(c) Guidelines for using imminent hazard, enforcement, and emergency response authorities; promulgation by Administrator of EPA, scope, etc.

Within one hundred and eighty days after December 11, 1980, the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the

Administrator of the Environmental Protection Agency to effectuate the responsibilities and powers created by this chapter. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 1321 (c)(2), 1318, 1319, and 1364 (a) of title 33, (2) sections 6927, 6928, 6934, and 6973 of this title, (3) sections 300j–4 and 300i of this title, (4) sections 7413, 7414, and 7603 of this title, and (5) section 2606 of title 15.

Section 107 – Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in the subsection (b) of this section —

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of

hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title. . . .

Appendix E

Section 113 – Civil proceedings

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Appendix E

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

Section 120 – Federal Facilities

(a) Application of chapter to Federal Government

(1) In general

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to,

and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under section 9606 and 9607 of this title.

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In The
Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

v.

MOTOROLA, INC. AND
ADECCO EMPLOYMENT SERVICES, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF MOTOROLA, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should accept petitioner's invitation to define "direct evidence" in the context of employment discrimination even though this issue was not addressed by the courts below and, in any event, cannot alter the outcome of this case?

2. Whether this Court should exercise certiorari jurisdiction to determine whether the court of appeals misapplied a well-settled legal standard as to which there is no split in the circuits, particularly where the court of appeals determined that petitioner "distort[ed] and exaggerate[d] the evidence and testimony on the record"?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Motorola, Inc. ("Motorola") states that it is a publicly held corporation, has no parent company, and no publicly held company owns 10% or more of its stock.

All parties to the appeal in the Eleventh Circuit are listed in the caption of the petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	6
I. This Is Not A Good Vehicle For Addressing The First Question Presented	6
II. There Is No Split In The Circuits To Justify This Court's Review Of The Second Question Presented	7
CONCLUSION	10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

City of Springfield v. Kibbe, 480 U.S. 257 (1987) 6

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 4, 7, 8, 9

Gupta v. Florida Bd. Of Regents, 212 F.3d 571 (11th Cir. 2000) 8

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) 8

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) 8

Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998) 4, 8

United States v. Williams, 504 U.S. 36 (1992) 6

RULES

Supreme Court Rule 10 ..... 1, 9

Eleventh Circuit Rule 36-2 5

BRIEF OF MOTOROLA IN OPPOSITION

The petition for writ of certiorari should be denied because this case is not a good vehicle for addressing the questions presented. The first issue – the purported split among the circuits on the meaning of "direct evidence" – was not addressed by either court below and, in any event, cannot affect the outcome of this case because the purported direct evidence is not relevant. The second asks whether the Eleventh Circuit misapplied established law to the particular facts of this case and thus does not warrant the exercise of this Court's certiorari jurisdiction under Supreme Court Rule 10. Further, there is no split in the circuits on this issue to justify this Court's review.

COUNTERSTATEMENT OF THE CASE

The court of appeals, like the district court, noted that the position of petitioner Meghan Bussell ("Bussell") "represents a misreading of the record and either distorts or exaggerates the evidence and testimony in the record." Pet. App. at 7a; *see id.* at 26a n.7. The same is true here. Motorola, therefore, submits the following counterstatement of the case.

The relevant events transpired during a three month period when Bussell worked for Respondent Adecco Employment Services, Inc. ("Adecco") as a temporary employee assigned to assemble police radios at Motorola's "Inpact Center." *Id.* at 13a. Bussell began working at the Inpact Center in August 2000, but she testified that she did not believe that she was sexually harassed until October 2000. *Id.* at 2a-3a. Bussell also concedes that she did not experience any further incidents of sexual harassment once she complained to Motorola's Human Resources Department

("HR") on or about December 27, 2000. *Id.* at 17a. After making her complaints known to Motorola's HR department, Bussell told Motorola that she was comfortable with returning to the Inpact Center. *Id.* at 15a-16a. Bussell resigned from her position at the Motorola Inpact Center on January 31, 2001, and immediately found other employment. *Id.* at 18a.

Bussell alleges sexual harassment based on: (1) comments made by a co-worker, Robert Render ("Render"), in October, November, and December 2000; (2) an incident in October 2000, when Render pulled on Bussell's clothing to expose a tattoo; (3) approximately 10 to 15 times in November or December 2000 when Render walked behind Bussell's desk and allegedly "rub[bed] his crotch against [her] back as he walked by, as if there was not enough room for him to get through;" and (4) a single unwelcome experience with another co-worker, Jason Wells ("Wells"), who grabbed and tickled Bussell one day in late October or early November 2000. *Id.* at 13a-14a.

Neither Render nor Wells supervised Bussell. *Id.* at 9a, 12a, 27a. They were only co-workers. *Id.* Bussell's immediate supervisors were Adecco's Tom Karge ("Karge") and Motorola's Laila Pennington ("Pennington"). *Id.* at 2a. When Bussell reported the tattoo incident to Pennington and Karge in October 2000, they promptly held a meeting for the entire department in which they reiterated to the employees (approximately 30 to 40) that neither touching nor talking "dirty" was permitted in the workplace. *Id.* at 14a. Pennington emphasized that Motorola and Adecco had "zero tolerance" for such behavior and that the employees were required to follow the companies' sexual harassment policies. *Id.* Although Bussell complained of the "rubbing" to her Adecco supervisor, she never told her Motorola supervisor about this alleged behavior. *Id.*

Bussell has admitted that she did not report the alleged sexual harassment to Motorola's HR department until late December, 2000, and then only after she herself engaged in offensive conduct. *Id.* at 5a. On December 26, 2000, Bussell began swearing at Render after he called her a "stupid girl." *Id.* Karge then took Bussell to Motorola's HR department, where she was written up for cursing. *Id.* It was at this time that Bussell first complained to Motorola's HR of sexual harassment. *Id.* Marcy Covington, Motorola's HR Administrator, immediately commenced an investigation of Bussell's sexual harassment claims. *Id.*

No witnesses corroborated Bussell's claims of inappropriate touching. *Id.* at 16a. Motorola did find that Render used foul language. *Id.* Motorola, however, concluded that – while the language was a form of harassment – it was not *sexual* harassment. *Id.* Most of Render's offensive comments were made to technicians who sat near him and were not directed specifically at Bussell. *Id.* at 2a, 8a, 13a. As punishment for his boorish conduct, Motorola gave Render a written warning, transferred him to a different department, and placed him on probation for a one-year period. *Id.* at 5a. Motorola also held mandatory sexual harassment training for all employees in the Inpact Center. *Id.* Bussell felt that she should not have had to attend the training session and that her required attendance was a form of retaliation. *Id.* at 6a.

Bussell claims that she had wanted to become a full-time employee at Motorola, but that an Adecco employee, Karge, told her that she could not because Motorola was tired of her complaining. *Id.* She admits, however, that no member of Motorola management had ever told her that her "complaining" had caused her not to become permanent. *Id.* at 6a-7a. She also admits that only a "couple" of

Adecco employees were hired as permanent Motorola employees. *Id.* The undisputed evidence showed that temporary employees were not eligible to become full-time employees until they had worked at Motorola for at least 12 months. *Id.* at 31. Bussell had worked there less than nine months when she resigned.

After resigning, Bussell sued Adecco and Motorola for sexual harassment, retaliation, and constructive discharge. The district court granted Adecco and Motorola summary judgment on all counts. In rejecting the sexual harassment claim, the district court followed precedents from this Court. *Id.* at 24a. "Although Title VII's prohibition of discrimination clearly includes sexual harassment, binding case law is quick to point out that Title VII is not a federal 'civility code.' *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998) ('We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.'); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). . . ." Pet. App. at 21a. The district court concluded that Bussell's workplace sexual harassment claims failed as a matter of law because, "[a]fter sifting out Render's offensive comments that were not directed at Bussell or comments that were not of a sexual nature," all that is left is co-worker conduct that is not so severe or pervasive as to render the employer liable under the standards prescribed by this Court. *Id.* at 27a-28a.

With respect to Bussell's retaliation claim, the district court found that the actions she cited as retaliation did not rise to the level of adverse employment actions as a matter of law and that there was no evidence that Bussell had suffered from an adverse employment decision by either

Motorola or Adecco. *Id.* at 30a. "It is undisputed that Bussell never spoke with anyone at Motorola before deciding to resign. . . . Additionally, . . . Bussell was never eligible for and thus, was never denied a permanent position at Motorola. The fact that she may have wanted or even expected to receive a permanent position at some time in the future is irrelevant." *Id.* at 30a-31a. The district court further held that Bussell's claim of constructive discharge had no merit because, by Bussell's own admission, the alleged sexual harassment had stopped before she resigned from Motorola. *Id.* at 31a.

The Eleventh Circuit affirmed in an unpublished *per curiam* opinion that is not considered binding precedent. *Id.* at 1a; *see* Eleventh Cir. Rule 36-2. On its face, the opinion of the court of appeals is fact-specific. It does not attempt to establish a new standard for judging sexual harassment claims or to distinguish between direct and circumstantial evidence. After conducting an extensive *de novo* review of the record and case law, the court of appeals could find no precedent to support the conclusion that the co-worker behavior alleged by Bussell was sufficiently severe or pervasive to constitute hostile workplace sexual harassment. Pet. App. at 9a. The court of appeals also found that the timing of Bussell's voluntary resignation – a fact issue – negated the retaliation and constructive discharge claims. *Id.* at 10a. The Eleventh Circuit, therefore, affirmed for the reasons set forth in the district court's order, which correctly articulated the controlling legal standards. *Id.* at 9a.

REASONS FOR DENYING THE PETITION

I. This Case Is Not A Good Vehicle For Addressing The First Question Presented

Petitioner's first question asks this Court to resolve what petitioner claims is a split of authority, or at least confusion, within the Eleventh Circuit and among the circuits regarding what constitutes "direct evidence" in an employment discrimination case. Petitioner's question does not warrant review, however, because the issue was not addressed below. *E.g., United States v. Williams*, 504 U.S. 36, 41 (1992); *City of Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987).

In the district court, petitioner argued that she had "direct evidence" of retaliation because, according to her, Karge, her Adecco supervisor, had told her that her Motorola supervisor had told him that petitioner would not get a permanent Motorola position because she "complained too much." Motorola's principal response was that the alleged statement was inadmissible as double hearsay. The district court never determined whether the statement was either hearsay or direct evidence. Instead, the district court found that there was no adverse employment action as necessary to support a retaliation claim because Bussell voluntarily resigned before being eligible for the permanent position. Pet. App. at 31a. Likewise, the court of appeals never discussed the direct evidence issue. It simply affirmed the summary judgment "for the reasons set forth in the district court's order." *Id.* at 9a. In any event, Bussell's voluntary resignation when she was not even eligible for permanent employment negates her retaliation claim and renders the inadmissible purported direct evidence irrelevant. *Id.* at 9a-10a, 30a-31a.

In her petition, Bussell also argues that there is direct evidence of constructive discharge and sexual harassment in the form of findings by Adecco and Motorola that Bussell was subjected to sexual harassment. *Id.* at 15. However, this purported direct evidence does not exist. Neither Adecco nor Motorola found that Bussell was subjected to sexual harassment. *Id.* at 16a. As noted by the district court and the court of appeals after its *de novo* review – although Motorola found that Render used inappropriate language – it rejected Bussell's contention that Render sexually harassed Bussell. *Id.* Moreover, there is no basis to grant Bussell's petition on this purported direct evidence issue because the court below never distinguished between direct and circumstantial evidence of sexual harassment.

II. There Is No Split In The Circuits To Justify This Court's Review of the Second Question Presented

The Court should reject Bussell's attempt to manufacture a split in the circuits on the burden of proof necessary to establish a claim for sexual harassment. Bussell's real problem is that the panel found the facts did not support a legal claim under well-established standards, not that it articulated a new legal test that creates a split in the circuits.

The court of appeals specifically applied the totality of the circumstances test articulated by this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998). It affirmed only after conducting an extensive review of the totality of the circumstances and concluding that the evidence of co-worker harassment was insufficient

because it was not so severe or pervasive to alter the conditions of her employment. Pet. App. at 8a. The panel cited *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 582-83 (11th Cir. 2000), which, in turn, sets out the *Faragher* "totality of the circumstances" test. Pet. App. at 8a. The panel also endorsed the opinion of the district court, which correctly invoked the *Faragher* standard. Pet. App. at 9a, 21a.

In *Faragher*, this Court explained that, in determining whether an environment is sufficiently hostile or abusive to constitute actionable sexual harassment, the courts must look "'at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher v. City of Boca Raton*, 524 U.S. at 787-88, *citing Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993); *accord Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). That is precisely what the district court and court of appeals did in this case. Pet. App. at 24a-25a.

Bussell also challenges the panel's finding that Render's crass descriptions of strip bars and the like, which were directed to his co-workers at large rather than to Bussell, did not constitute sexual harassment. *See* Pet. App. 8a. When read in context, however, this statement is merely another way of heeding this Court's frequent admonitions not to make Title VII a "general civility code." *Faragher*, 524 U.S. at 788, *citing Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998). The court of appeals did not announce an absolute bar to a sexual harassment claim any time a male witness to sexual harassment finds it offensive, as Bussell claims. Rather,

the court of appeals found that there must be sexual harassment in the first place before liability can attach. Pet. App. at 8a-9a. This finding, which is consistent with the teaching of this Court, does not support Bussell's petition.

None of the cases cited by Bussell conflicts with the rule of law cited by the courts below. Bussell has not demonstrated a split among the circuits on the standard for a sexual harassment claim. All of the cases cited by Bussell turned on the application of the same *Faragher* factors that governed the opinions below. Moreover, this Court should not adopt the new rule urged by Bussell – that an employer is *per se* liable for work environment sexual harassment based on unreported touchings by a co-worker with no supervisory authority – which is without precedent. *See* Pet. App. at 9a.

In sum, the Court should deny review of the second question because it really asks this Court to determine whether the unpublished, *per curiam*, fact-intensive opinion of the court of appeals erred in the application of a correctly articulated rule of law. As explained by Supreme Court Rule 10, such is not an appropriate reason for exercising this Court's certiorari jurisdiction.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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